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The laws governing the introduction of evidence naturally conform themselves to modern scientific development. The use of the X-ray in court is an apt illustration. In a recent case decided by the Supreme Court of Tennessee (Bruce v. Beall), which was an action for personal injuries, it was held that it was competent to submit to the jury an X-rays photograph, taken by a surgeon, showing the overlapping bones of one of plaintiff's legs where it was broken at the time of the accident, where the surgeon was familiar with the process by which the impression was secured, as well as with fractures, and testified that the photograph accurately represented the condition of the leg at the point of fracture, and that, by the aid of the X-rays, he was enabled to see the fracture and overlapping as if they were uncovered to the sight. It appeared that in the progress of the trial a physician was introduced as a witness, who was permitted to submit to the jury an X-ray photograph taken by him, showing the overlapping bones of one of plaintiff's legs at the point where it was broken by the fall. This was objected to by the defendant's counsel. This picture was taken by the witness, who was a physician and surgeon, not only familiar with fractures, but with the new and interesting process by which this particular impression was secured. He testified that this photograph accurately represented the condition of the leg at the point of the fracture in question, and, as a fact, that by the aid of X-rays he was enabled to see the broken and overlapping bones with his own eyes, exactly as if, stripped of the skin and tissues, they were uncovered to the sight. The court said that they might, if they so desired, rest their conclusion on the general character of the exceptions taken to this testimony, but they preferred to place it on the ground that, verified by this picture, it was altogether competent for the purpose for which it was offered. "New as this process is," says the court, "experiments made by scientific men, as shown by this record, have demonstrated its power to reveal to the natural eye the entire structure of the human body, and that its various parts can be photographed as its exterior surface has been and now is. And no sound reason was assigned at the bar why a civil court should not avail itself of this invention, when it was apparent that it would serve to throw light on the matter in controversy." Maps and diagrams of the *locus in quo* drawn by hand are often used to aid a judge or a jury to an intelligent conception of the matters to be determined, and no one would think of questioning the competency of the testimony of a witness who stated that he knew the map or diagram to be entirely accurate, and who then used it to illustrate or make plain his statement. The pictorial representation of the condition of the broken leg of the plaintiff gave to the jury a much more intelligent idea of that particular injury than they would have obtained from any verbal description of it by a surgeon, even if he had used for the purpose the simplest terms of his art. The only case in this country wherein the exact question seems to have been determined and a similar conclusion reached, is Smith v. Grant, before a Colorado court, to which we called attention at the time, but photographs showing exterior surfaces have been admissible in numerous cases. They have been held competent on the question of identity of persons (Udderzook v. Com., 79 Pa. St. 340; Cowley v. People, 83 N. Y. 464; Luke v. Calhoun Co., 52 Ala. 118; Ruloff v. People, 45 N. Y. 213), and to identify premises (Church v. City of Milwaukee, 31 Wis. 512; Blair v. Pelham, 118 Mass. 421), and in cases of handwriting. Marcey v. Barnes, 16 Gray, 161. As the Tennessee court very properly says it should not be understood that every photograph offered as taken by the cathode or X-ray process would be admissible. Its competency, to be first determined by the trial judge, depends upon the science, skill, experience and intelligence of the party taking the picture and testifying with regard to it, and, lacking these important qualifications, it should not be admitted; and, again, even when it is not conclusive upon the triors of fact, it is to be weighed like other competent evidence.

The decision of the Court of Appeals of Kentucky in the recent case of Blackburn v. Wright, may be technically correct, but it

will doubtless strike the ordinary modern practitioner as one of the nonsensical refinements of reason with which the common law abounds. The holding of the court was that words charging a plaintiff with "stealing" the door of a house are not actionable *per se*, because they impute only the offense of a trespass to real property and do not involve moral turpitude. Under the English rule, they say, words which impute that plaintiff has been guilty of a crime punishable with imprisonment are actionable without proof of special damages, but, if the offense imputed be only punishable by penalty or fine, the words will not be actionable without proof of special damages. It is quite true, that at common law, in order to render the charge actionable *per se* the act imputed shall not only be subject to an infamous punishment but also to involve moral turpitude. At common law larceny was restricted to personal property. Real estate could not be the subject of the offense of larceny, and the same rule extended to everything which adhered to the realty, or to the soil; so that if one, even with felonious intent, severed and carried away anything which formed a part of the freehold, he does not, at least by the rules of common law, commit the offense of larceny but is guilty only of trespass. In some States this rule of the common law has been materially changed by statutory enactment, but in Kentucky the common law rule seems to prevail.

NOTES OF RECENT DECISIONS.

MARRIED WOMAN—NATIONAL BANK STOCK—OWNERSHIP AND PERSONAL LIABILITY.—The question presented by the case of Kerr, Receiver, v. Urie, 37 Atl. Rep. 789, before the Court of Appeals of Maryland, is whether a married woman living in one State is capable of holding stock in a national bank located and doing business in another State, and if so whether she is liable as such stockholder, under the personal liability provisions of the United States statute. The court decided in the affirmative saying, that "whatever difficulty may surround this question arises, we think, more from the manner in which it is presented in this case than from any other cause, for it can hardly be supposed that, at this day, when, by the law of most all the States, a married woman may contract as a *feme sole* in respect to her separate estate, she is without power to subscribe for or become the transferrer of the stock of a national bank."

JUDGMENT—ACTION AGAINST DEAD PERSON.—As to the validity of judgments in favor of or against persons rendered after their death, there is great contrariety of opinion. One class of authorities holds that all such judgments are absolutely void. Another class holds that those which are rendered in suits commenced after the death of the party are void, but that, where the parties are alive when the suits are commenced and the court once acquires jurisdiction over their persons, judgments therein rendered are not void, though the parties be dead before this rendition. Other cases take the broad position that the judgments are not void in either of the cases stated, but that they are only voidable by direct proceeding. Speaking of the cases mentioned in the first and third classes, Mr. Freeman says: "We apprehend that neither position is correct. That there should, at some time during its progress, be living parties to both sides of an action, we think indispensable; and that no sort of jurisdiction can be obtained against one who was dead when the suit was commenced against him as defendant, or in his name as plaintiff; and that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun; and that a judgment for or against him must necessarily be void." Freem. Judgm. § 153. To the same effect is Black, Judgm. § 203. Vanfleet, in his work on Collateral Attack, holds that the judgment is valid until set aside by direct attack, whether the party died before or after the commencement of the action. Sections 587, 602, and 603. The decisions upon all of the phases of the question will be found cited by these authors at the places in their works above indicated, and in the note by Freeman to the case of Watt v. Brookover (W. Va.), 29 Am. St. Rep. 816-819, 13 S. E. Rep. 1007, the Supreme Court of Texas after a review of all the cases on the subject has recently held that a judgment in an action

against one dead at commencement of the action is void, though the action is to subject land to a lien. M. T. Jones Lumber Co. v. Rhoades, 41 S. W. Rep. 102.

MUNICIPAL CORPORATION — LIABILITY FOR TORTS OF OFFICERS—FALSE IMPRISONMENT.—In Royce v. Salt Lake City, 49 Pac. Rep. 290, decided by the Supreme Court of Utah, the plaintiff was arrested by a police officer of defendant city, for vagrancy, without warrant, no public offense being shown to have been committed in his presence. He was tried on a verbal charge of vagrancy in the police court, without any written complaint being filed against him, was convicted, and sentenced to imprisonment, but not to hard labor, and held without commitment from the police court. By order of the chief of police, plaintiff was put at work upon the stone quarry, where he received from a fellow prisoner the injury complained of. It was held that the acts of the chief of police, requiring him to work breaking stone, when not sentenced to hard labor, at the time of the injury, were *ultra vires;* that the officers were not acting as agents of the city government, but were trespassers, and the corporation is not liable to the action for damages; that authority granted by resolution of a city council, directing the marshal to work prisoners, does not confer the right to require those in custody, but illegally imprisoned, and not sentenced to hard labor, to be thus employed and that all torts or wrongful acts of an agent or officer of a municipal corporation, not resting upon contract, but which are "*ultra vires*," in the proper sense and meaning of the term, will not create an implied liability on the part of the corporation. The court cited the following cases as authority for the general proposition that, in such cases as this, police officers are not the servants of the corporation to the extent of involving the latter in liability: Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. Rep. 1030; Smith v. City of Rochester, 76 N. Y. 506; Calwell v. City of Boone, 51 Iowa, 687, 2 N. W. Rep. 614; Town of Odell v. Schroeder, 58 Ill. 353; 1 Shear. & R. Neg. § 300; Mechem, Ag. §§ 111, 112; Alamango v. Board of Sup'rs, 25 Hun, 551; Curran v. City of Boston, 151 Mass. 505, 24 N. E. Rep. 781; Mayor of Albany v. Cunliff, 2 N. Y. 165; Peters v. City of Lindsborg, 40 Kan. 654, 20 Pac. Rep. 490; Ball v. Town of Woodbine, 61 Iowa, 83.

MORTGAGE—REDEMPTION—RATE OF INTEREST—AMENDMENT OF STATUTE AFTER SALE.—In Thresher v. Atchison, 48 Pac. Rep. 1020, decided by the Supreme Count of California, it was held that a statute decreasing the rate of interest to be paid to redeem land sold on execution is inoperative on a sale made prior to the passage of the act. The court said that it has been frequently held that a law extending the time within which a redemption may be made from a sale under a judgment will be inoperative upon a sale made prior to the passage of the act; that the purchaser at the sale acquires rights thereby of which he cannot be divested by subsequent legislation. Cooley, in his treatise on Constitutional Limitations (page 353), says: "A law is void which extends the time for the redemption of lands sold on execution, or for delinquent taxes after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the substance of the contract as much as would be the extension of the time for payment of a promissory note." Mr. Freeman, in his treatise on Executions (section 317), in discussing the effect upon the rights of the judgment debtor of a statute authorizing a redemption from a sale passed after the sale has been made, says: "But the right of the purchaser to a conveyance, or to repayment at the termination of the period allowed for redemption, is deemed to rest upon a contract which the legislature will not be permitted to impair. Hence, while the time for redemption may probably be shortened, it certainly cannot be prolonged by any law enacted after the sale." The same principles which render void an act extending the time for redemption after the sale has been made will render void an act reducing the amount of money required for a redemption from such sale. The sale by the sheriff is regarded as a sale by the judgment debtor (Blood v. Light, 38 Cal. 658); and the purchaser is entitled to rely upon the statutory provisions for redemption

existing at the time of the sale to the same extent and in the same manner as if they were incorporated into a contract of sale executed by the debtor.

VENDOR AND PURCHASER — FALSE REPRESENTATIONS.—In Andrews v. Jackson, 47 N. E. Rep. 412, decided by the Supreme Judicial Court of Massachusetts, it was held that whether a representation by a vendee that notes of a third person, given in part payment of the price, were "as good as gold," was a mere expression of opinion, or a statement of fact on which the vendor was entitled to rely, was a question for the jury. The court said:

The principal question in this case is whether there was any evidence to warrant a finding that the false representations made by the defendant in regard to the notes were actionable. This finding is in these words: "I find that the defendant represented these notes to be as good as gold, and that that representation was intended by him and understood by the plaintiff not to be an expression of opinion, but a statement of a fact of his own knowledge. I find that the notes were worthless." It is contended by the defendant that such a representation is necessarily and as a matter of law a mere expression of opinion, for which, however willfully false, and however damaging in the reliance placed upon it, no action can be maintained. It is true that such a representation may be, and often is, a mere expression of opinion. But we think that it may be made under such circumstances and in such a way as properly to be understood as a statement of fact upon which one may well rely. In Stubbs v. Johnson, 127 Mass. 219, one of the representations in regard to a note was that it was "as good as gold," and the jury were instructed that, if this was intended as a representation of the financial ability of the maker of the note, it was a statement of a material fact, for which the defendant was liable. This instruction was held erroneous, "because a representation as to a man's financial ability to pay a debt may be made either as a matter of opinion or as matter of fact; the subject of the statement does not determine which it is." "It is often impossible," says Mr. Justice Colt further in the opinion, "to determine as a matter of law whether a statement is the representation of a fact which the defendant intended should be understood as true of his own knowledge, or an expression of opinion. That will depend upon the nature of the representation, the meaning of the language used as applied to the subject-matter and as interpreted by the surrounding circumstances in each case. The question is generally to be submitted to the jury." The opinion plainly implies that if the jury had been left to determine whether there was a representation of the maker's financial ability to pay made as a matter of fact, and not as a mere matter of opinion, they might have found against the defendant on his false representation that the note was "as good as gold." In Belcher v. Costello, 122 Mass. 189, there is also a strong intimation that the rule is as above stated. In Safford v. Grout, 120 Mass. 20, the representations set out in the declarations were that the maker of the note "was a person of ample means and ability to pay said note, and that the note was good." The plaintiff was allowed to recover. The court says of the representations: "We must presume that they were legally sufficient to support the action; that is to say, that they were statements of fact susceptible of knowledge, as distinguished from matters of mere opinion or belief." See, also, Teague v. Irwin, 127 Mass. 217; Morse v. Shaw, 124 Mass. 59. In two recent cases—Way v. Ryther, 165 Mass. 226, 42 N. E. Rep. 1128, and Kilgore v. Bruce, 166 Mass. 136, 138, 44 N. E. Rep. 108—this court has expressed a disinclination to extend the rule which permits dealers to indulge with impunity in false representations of opinion. In the case now before us the notes were turned over to the plaintiff in part payment of the agreed price for land sold to the defendant. He professed to know, and probably did know, all about the financial standing of the maker of them, who lived in Boston. The plaintiff lived in a suburban town, and knew nothing of the maker. She was obliged to take the defendant's representations, or to decline to deal with him until she could go to Boston and make an investigation for herself. He told her that he had lent money to the maker, and said, "Do you suppose I would lend my money to any one that was not good?" A representation that a note is as good as gold may be founded on absolute personal knowledge of the validity of the note, and upon an equally certain knowledge of the maker's financial ability. The known facts upon which financial ability depends may be so clear and cogent as to make the consequent conclusion, which ordinarily would be a mere matter of opinion, a matter of moral certainty, which can properly be called knowledge. We cannot say, as matter of law, that this representation was not intended to be, and properly understood to be, a representation of facts within the defendant's knowledge. The case of Deming v. Darling, 148 Mass. 504, 20 N. E. Rep. 107, differs materially from this at bar. The property to which the representation related was one of many mortgage bonds issued by a railroad company, of which, in the language of the opinion, the "market prices, at least, were easily accessible to the plaintiff." The representations which were held to be insufficient on which to found an action were "in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it." The value of articles sold in market, and especially of railroad property, and of railroad bonds payable in the distant future, is ordinarily only a matter of opinion. A statement of the value of such property is very different from a statement that a promissory note, which is almost due, is known to be valid, and that the maker of it is a person of such known integrity and financial ability that his promise to pay is as good as that of the State or nation. A statement that a note is as good as gold may be intended to represent facts of this kind.

THE TELEGRAPH COMPANY'S LIABILITY RELATIVE TO CIPHER MESSAGES.

General Powers and Liabilities of Telegraph Companies.—The telegraph company is an agent of the public, carefulness and fidelity are essential to its character, and the law should not uphold a contract under

which it seeks to shelter itself from its own wrong and neglect. Its liability for neglect is not founded upon contract. It is chartered for public purposes; extraordinary powers are therefore conferred upon it; it has the power of eminent domain; if it did not serve the public it could not constitutionally lay a wire over a man's land without his consent; and by reason of the gift of these privileges it is required to receive and transmit messages, and is liable for neglect, independent of any express contract. The public are compelled to rely absolutely upon the care and diligence of the company in its transaction of this business, so wonderful in its growth, so necessary to the life of commerce and useful beyond estimate; and if it relies upon a notice or contract to restrict or limit its liability, it must not be one in violation of public policy; and in view of the vast interests committed to a telegraph company, the extraordinay powers given it, and the virtual monopoly it almost necessarily enjoys, the courts should compel it to perform the corresponding duties of diligence and good faith to the public thereby created. Any other rule would defeat the very purposes for which these companies are chartered, to wit: the safe and speedy transmission of messages for the public; and while they may reasonably restrict their liability yet they can not do so as against their own negligence.[1] They undertake to exercise a public employment which in many respects is analogous to that of common carriers; and they must therefore bring to it that degree of skill and care which a prudent man would under the circumstances, exercise in his own affairs; and any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non use is forbidden by the demands of a sound public policy. To hold otherwise would arm them with a very dangerous power and leave the public comparatively remediless.[2]

Cipher Messages Defined. — Telegraph Companies furnish the senders of messages blanks, upon the backs of which are printed the conditions under which they seek to limit their liability for the mistransmission or delayed transmission of their messages. Among such conditions we find that the company shall not be liable in any case for errors in cipher and obscure messages. It will doubtless be best to explain what is meant by a cipher message as here used, consequently I shall define it as follows: A cipher message is one formed of words made up of letters of the English alphabet which is impossible to translate without the aid of a key, privately used, between the sender and the addressee of the same.

American Rule Criticised.—Various positions have been taken by the courts in the different States in regard to the telegraph company's liability relative to cipher dispatches. The leading case in the United States being Candee v. West. Union Tel. Co.,[3] in which the Supreme Court of Wisconsin lays down the rule, as follows: "Where the import of a telegraphic message is wholly unknown to the company's agent, to whom the same is delivered for transmission, it cannot be assumed that he had in view any pecuniary loss as the natural or probable result of a failure to send such a message; and in such case, upon a breach of the contract to transmit and deliver, the sender can recover only nominal damages or the amount paid for sending the message." The use of the cipher message in commercial intercourse having become so popular, and its utility so well established, the question of a telegraph company's liability for an improper or delayed transmission of, or the neglect to transmit the same, is one of the most important legal problems of the day. The decision quoted from, obliges one sending a cipher message to explain its import to the agent to whom it is delivered for transmission. One of the great attractions which this mode of communication presents is the brevity of dispatch, such abbreviations being used in many cases as will enable the

[1] Ellis v. Am. Tel. Co., 13 Allen (Mass.), 226; N. Y. Cent. R. R. Co. v. Lockwood, 17 Wall. 357; Tyler v. West. Union Tel. Co., 60 Ill. 421; Stiles v. West. Union Tel. Co., 15 Pac. Rep. 712; West. Union Tel. Co. v. Blanchard, 68 Ga. 299; West. Union Tel. Co. v. Reynolds, 77 Va. 173; West. Union Tel. Co. v. Griswold, 37 Ohio St. 313; West. Union Tel. Co. v. Adams, 87 Ind. 598; West. Union Tel. Co. v. Crail, 38 Kan. 679; West. Union Tel. Co. v. Graham, 1 Colo. 230.

[2] Smith v. West. Union Tel. Co., 8 Am. & Eng. Corp. Cases, 20; West. Union Tel. Co. v. Fontaine, 58 Ga. 433; Wolf v. West. Union Tel. Co., 62 Pa. St. 83; Breese v. U. S. Tel. Co., 48 N. Y. 132; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232; West. Union Tel. Co. v. Buchanan, 35 Ind. 429; Hibbard v. West. Union Tel. Co., 33 Wis. 558; Tel. Co. v. Griswold, 37 Ohio, 301; Tyler v. West. Union Tel. Co., 60 Ill. 421; Ellis v. Am. U. Tel. Co., 13 Allen, 234.

[3] 34 Wis. 471.

person for whom it is intended alone to understand it, and hence the vast amount of business the telegraph operator is capable of transacting in the transmission and delivery of messages. So that an explanation of the meaning, importance and bearing of each message would be an insufferable annoyance, and in the multiplicity of messages delivered for transmission would not be remembered, even if the time could be spared to listen to it and it would rarely afford any advantage to the company after the information was communicated. Although the company through its agents may not know the meaning of the particular message, it does know that messages of great value and importance involving great losses in case of a failure or delay or mistake in transmission are constantly sent over its wires; and it does know that it holds itself out to the public as prepared at all times and for all persons to transmit messages of this description.[4] In Hart v. West. Union Tel. Co.,[5] it was said: "Telegraph companies have conferred upon them by law certain privileges, among them, the right of eminent domain and they are charged with certain duties, among them, the obligation to send properly and correctly such messages as are intrusted to them. Of course, if illegibly written, the operator may reject a message; but if plainly written his duty is to send it as written. Why has he the right to know what the message refers to? In what way would such knowledge aid him in the discharge of his duty to send it correctly?" In West. Union Tel. Co. v. Hyler Bros.,[6] it was held: "When a telegram is delivered to an operator employed by a telegraph company for transmission and delivery to the person to whom it is addressed, and the consideration for said services is paid to and accepted by such operator, the law enjoins on such company prompt and skillful performance of its undertaking. It is no defense for the said company when sued for failure to transmit and deliver a telegram as above, that the sender did not inform it or its operator of its importance, when it failed to show that if it or its operator had received such information it would have changed the method of its transmission or the time in which it was to be sent, the agency employed, the price demanded therefor, or the skill used in its transmission; nor that such message is in cipher or words the meaning of which the operator does not know, provided such message is plainly written and the words therein are in the letters of the English alphabet."[7] It is generally, if not universally true, that when one resorts to the telegraph, the communication is of such importance that this mode has been selected rather than to delay the matter by writing a letter; accordingly the weight of authority holds that messages must be sent in the order of their handing in, without favor or partiality, without delay and without reference to the value of the interests to be affected.[8] Although the company may make any reasonable restriction as to its liability, the mere fact that a restriction is printed on the blanks furnished by such company for the use of the sender of a message is by no means conclusive. The company fix its own charge for the transmission of a message not according to the importance or value of the matter to which it refers, but according to the distance to be sent and the number of words used in such message. The telegraph, although an invaluable invention, is a simple device, and messages are transmitted by merely clicking letter by letter. If by the uncertainty of the electrical current or by breaks in the wires or instruments or by any other unavoidable accident, mistakes or delays are liable to occur, the company should repeat every message sent. If this should compel it to advance the present price for transmitting a message,—let such price be fixed and be uniform. But it ought to adopt and use but one of these modes and regulate its prices accordingly, for the majority of persons sending messages rely absolutely upon the competency of the company and do not care to take the seemingly superfluous precaution of having their messages repeated. All that is required of the company after having accepted a message in cipher, is to transmit it

[4] Scott & Jarnagin, "Law of Telegraph," § 404.
8 Am. & Eng. Corp. Cases, 56.
[6] 22 Fla. 637.

[7] Gray on Telegraphs; West. Union Tel. Co. v. Ferguson, 57 Ind. 495.
[8] Barron v. L. E. Tel. Co., 1 Am. Law Reg. 635; Berney v. N. Y. & W. Tel. Co., 18 Md. 341; West. Union Tel. Co. v. Ward, 23 Ind. 377; Leonard v. N. Y. A. & B. T. Co., 41 N. Y. 544; Squire v. West. Union Tel. Co., 98 Mass. 232; Parks v. Alta Cal. Tel. Co., 13 Cal. 422; Breese v. U. S. Tel. Co., 48 N. Y. 132; Shearm. & Red. on Neg., § 557; 8 Amer. Rep. 526, 532 and note.

as delivered, should the operator at the other end be uncertain, it can be repeated, but to compel the sender of such message to inform the company's operator to whom he delivers the same as to the meaning and import of such message is ridiculous. Such knowledge cannot aid him in transmitting it, nor can he alter the only course he has to pursue in sending it. By adopting a rule which does not require his knowledge of the import of messages, the committing of innumerable wrongs, discovery of which is generally impossible, will be terminated. After the sender has paid the price asked by the company for transmission the contract is performed upon his part. After the company has promptly, correctly and in proper turn, sent and delivered the message to the addressee of the same, its part of the contract has been performed, and not until then. Should the operator to whom the same is delivered for transmission be uncertain as to the letters or words, it is plainly his duty to inquire, but after having accepted the message, and the compensation for the same, he is, to my mind, estopped from setting up that the message was so illegibly written that he could not properly send it.

Messages Prima Facie Important.—It can safely be said that the larger part of all messages sent are of a commercial or business nature which suggests value. The requirements of friendship or pleasure can await other means of less celerity and less expense. If this be true, why should the law assume that as a rule, all messages sent are unimportant, and that an important one is an exception of which the operator is to be informed. The common carrier charges different rates of freight for different articles according to their bulk and value and their respective risks of transportation, and provides different methods of transportation for each. The telegraph companies do not have a scale of prices which is higher or lower as the importance of the dispatch is great or small. It cannot be said then, that for this reason the operator should be informed of its importance when it made no difference in the charge of transmission. Even if the importance of a message should be disclosed to the operator, the rules of the company do not allow him to send it out of the order in which it was received, with reference to other messages awaiting transmission, or to use any extra degree of skill or a different method or agency for sending it from the time or skill used, the agency employed or the compensation demanded for sending an unimportant dispatch. For what reason then, could he demand information that was in no way to affect his manner of action or impose on him any additional obligation?[9] Messrs. Scott and Jarnagin in their excellent treatise on the Law of Telegraphs say: "The telegraph is a modern discovery. Speedy communication is its boasted merit, the object of its use. It is much more expensive than communications by mail, and therefore could not be resorted to if time were not of its very essence. Its tariff of rates is graduated by the number of words employed, not by the pecuniary value of the telegram nor by the magnitude of the interest it concerns. With few exceptions, imposed by public exigency, it is governed by the law of the mill. Messages must be sent in the order of their handing in without favor or partiality, without delay and without reference to the value of the interests to be affected. The liability of the telegraph company does not depend upon the knowledge that the operator may have of the contents of the message."[10]

Damages Relative to Cipher Messages.—The next phase of this question to be considered, is the amount of damages recoverable in case of a delay or wrongful transmission of a cipher message. In Candee v. West. Union Tel. Co,[11] the rule appears as follows: "And in such case upon a breach of the contract to transmit and deliver, the sender can recover only nominal damages or the amount paid for sending the message." This part of the decision is undoubtedly founded upon the general rule of compensatory damages as laid down in the celebrated case of Hadley v. Baxendale:[12] "Where two parties have made a contract which one of them has broken, the damages which the other party ought to re-

[9] West. Union Tel. Co. v. Hyer, 22 Fla. 637; Bowen v. L. E. F. Tel. Co., 1 Am. Law Reg. 685, 16 Am. & Eng. Corp. Cases, 237; Gray on Telegraphs, § 587.

[10] S. & J. on Tel., § 166; West. Union Tel. Co. v. Way, 83 Ala. 542; Amer. Union Tel. Co. v. Daughtery, 89 Ala. 191; West. Union Tel. Co. v. Hyer, 22 Fla. 637; West. Union Tel. Co. v. Fatman, 73 Ga. 285; West. Union Tel. Co. v. Reynolds, 77 Va. 173.

[11] 34 Wis. 471.

[12] 9 Exch. 341.

ceive in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it." As to its application to cipher messages, let us consult the opinion of Chief Justice Stone in Daughtery v. Amer. Union Tel. Co.:[13] "Can such a rule, with any propriety be applied to transactions or dealings in which the same measure of diligence is required in each act or function without regard to the quantum of interest to be affected by it? Legal dogmas should rest on some principle which can be appreciated." In Virginia, Georgia, Florida and Alabama, the courts have laid down the doctrine that the measure of damages recoverable by the plaintiff, is not to be affected by the character of the message and the knowledge of the company as to its urgency or importance; that while the company might with some reason refuse to accept a cipher dispatch for transmission without having its words or letters composing the same explained, yet, after having accepted it and undertaken to transmit and deliver such dispatch, it cannot escape responsibility for its negligence by setting up its ignorance of the contents or importance of the telegram, but are liable for all damages caused by such negligence. In other words, that the amount of damages recoverable in case of negligence in sending a cipher dispatch is the same as the amount recoverable in case of a message of which the company's agent understands the import.[14] In West. Union Tel. Co. v. Way,[15] it was held: "The damages recoverable against a telegraph company for the failure to send a cipher message are the same as if the message was expressed in ordinary language and it is not necessary that its meaning should be explained to the receiving agent of the company." In Daughtery v. Amer. Union Tel. Co.,[16] it was laid down: "The liability of the telegraph company does not depend on the knowledge the operator may have of the contents of the message." In Amer. Union Tel. Co. v. Daughtery,[17] it was held: "For negligence in the transmission of a cipher message, the meaning of which is not explained to the receiving operator, the measure of damages recoverable against the telegraph company is the same as if the message was in ordinary language."

Conclusion.—From a careful examination of the cases on this subject, it appears to me, that after the message has been delivered to and accepted by the telegraph company and compensation has been paid to it for its transmission, its duty is to send such message correctly, promptly and in its proper turn, without any question as to its meaning or import, for a telegraph message is *prima facie* important; and if it neglects to, or negligently delays to or wrongfully sends the same, it is liable to the party injured thereby for the full amount of damages occasioned and not for mere nominal damages. Although the message be unintelligible to the company, yet as its undertaking was to transmit the message promptly and correctly, both parties contemplated that whatever loss should naturally and in the usual course of things follow a violation of that obligation, the company should be responsible for. When the message is delivered to the company, there is an implied promise on its part to transmit it correctly. It must be sent exactly as written; the operator has no right to change or alter in any respect the message so as to make it mean what he understands it to mean, even if without such alteration it be unintelligible to him. He has no right to insist on understanding its meaning; it may be wholly meaningless to him and yet intelligible to the person to whom it is addressed. If it be changed by the operator to mean what he understands the sender to intend, and loss thereby accrue, the company is responsible in damages.[18] The company is under no obligation to accept messages in cipher of arbitrary charac-

[13] 75 Ala. 168.

[14] West. Union Tel. Co. v. Reynolds, 77 Va. 173; West. Union Tel. Co. v. Way, 83 Ala. 542; West. Union Tel. Co. v. Fatman, 73 Ga. 285; Daughtery v. Amer. Union Tel. Co., 75 Ala. 168; West. Union Tel. Co. v. Hyer, 22 Fla. 637; Amer. Union Tel. Co. v. Daughtery, 89 Ala. 191; Sedg. on Dam., 6th Ed. 441; 2 Thomp. Neg., 856; 1 Daly, 474; 1 Am. & Eng. Law Reg, 685; 7 Abb. N. C. (N. Y.), 151, 154; 12 Civil Cases, 644; S. & J. "Law of Tel." Sec. 166.

[15] 83 Ala. 542.

[16] 75 Ala. 168.

[17] Amer. Union Tel. Co. v. Daughtery, 89 Ala. 191.

[18] N. Y. & Wash. Print Tel. Co. v. Dryburg, 35 Pa. St. 298; Scott & Jarnagin, "Law of Telegraph," Sec. 165.

ters or in a foreign alphabet, but if accepted they must be rendered or reproduced according to contract. If the message be in the proper alphabet and yet illegible, the operator could not know what words or letters to transmit and he should therefore decline it. These preliminaries must be settled at the outset, for, when once the message is received in due course of business, the obligation is perfect. GEO. T. KELLY.

Chicago, Ill.

JUDGMENT—NEW TRIAL — SURPRISE — ABSENCE OF PARTY.

SIMPKINS v. WHITE.

Supreme Court of Appeals of West Virginia, March 27, 1897.

During the term of court, the counsel representing the parties plaintiff and defendant in a case, in the presence of the regular judge, are talking over the business remaining unfinished, the defendant in said case being present, who understands from the conversation that his case should not be taken up before the next Tuesday for trial, which conversation was on Friday; and under this impression the defendant, with his witnesses, left the court. On Saturday a special judge was elected, who went upon the bench on Monday morning, and tried the case, in the absence of said defendant and his witnesses, and in ignorance of said misunderstanding, although an attorney for the defendant was in town, and had notice that a jury was being called in the case, and refused to go to the court house, on account of some feeling existing between himself and the special judge, and on account of his being, too, unwell to attend to business, and sent another attorney to state the matters to the court in reference to said understanding. The trial is proceeded with, and a judgment is rendered against the defendant, although he claims to have had a good defense. The trial of the cause, under the circumstances, works such a surprise upon the defendant that a motion to vacate the judgment, set aside the verdict, and award a new trial, should have prevailed.

(Note by Ed.—Code W. Va. 1887, ch. 112, § 11, provides that the attorneys present and practicing in the circuit court, may elect a special judge to hold court during the absence of the regular judge.)

ENGLISH, P.: This was an action of *assumpsit*, brought in the Circuit Court of Logan county, but afterwards transferred to Mingo county, in which Joseph Simpkins was plaintiff, and H. S. White was defendant. On the 16th day of September, 1895, the defendant not appearing, the case was submitted to a jury, upon the issue joined, and resulted in a verdict for the plaintiff for $2,200, and judgment was rendered upon said verdict, with interest thereon from the date of said judgment and costs; and on the same day the defendant, by his attorney, moved the court to vacate the judgment entered therein, and to set aside the verdict of the jury, upon the ground that he was not present at the trial, for the reason that it was his understanding that the case had been postponed to, and would not be called for trial until, the 17th inst., and he was taken by surprise. After hearing the evidence, the court overruled the defendant's motion, and refused to vacate said judgment, and set aside said verdict, and grant a new trial, to which ruling the defendant excepted, and applied for and obtained this writ of error.

The difficulty in this case seems to have arisen from the fact that, the regular judge having absented himself, a special judge was elected to proceed with the trial of the docket. It appears from the testimony of Thomas A. Harvey, who was the regular judge of that court, that at the dinner table on Friday (Mr. White, the defendant, and Mr. Shumate, his attorney, and Mr. Shepherd, attorney for the plaintiff, Joseph Simpkins being present) there was a conversation of which Judge Harvey says: "In the meantime I had set two felony cases for Monday. * * * I didn't think it possible that case should come up before Tuesday morning. Mr. Shumate agreed with me that he did not think it could come up, and Mr. Shepherd said that if it didn't come up before Tuesday, that he wouldn't be here. I didn't set the case at the court house, and, if I had been here, this case would not have been tried Monday before the train got here. * * * If I had been here Monday morning, we would have gone into the felony cases, and that case (meaning the one under consideration) would not have come up before Tuesday. That is my idea of the case. I did not, in court or out of court, set the case for any particular day. There were only two cases set,—Sparks against the R. R. Co. The lawyers agreed on Tuesday as the day, and I acquiesced in it." It appears that C. M. Turley was elected special judge on Saturday, and that the defendant, H. S. White, was aware of his election on Saturday. The case was heard in the forenoon on Monday, said special judge presiding. The defendant, H. S. White, in response to the question, "State why you were not here on Monday last?" said: "I had been here nearly all of last week on this case and others during the latter part of the week. I was under the impression it was on Saturday that Judge Harvey was going away, and that a special judge would be elected, and he was calling the docket (Judge Harvey was), and running down the list; and I understood that the railroad case, one of them, would be probably tried by the special judge, and, when he came to the case of Simpkins v. White, the judge looked around, and smiled,—Judge Harvey did; and I understood that there was another case that would keep them busy until Tuesday, and that he would take this case up Tuesday. I was sitting right here, watching the court, and Mr. Shumate was near by. I took the train home, and when at the train that afternoon, I saw some of my witnesses, and told them that I would probably telegraph them on Tuesday if the

case came up, and to be ready to come. I told them that I understood the case would go over until Tuesday, as it would take three or four days to try it; that was the impression made on my mind; that Judge Harvey would be back Monday; and that the special judge would not take it up." This witness further states that he was very much surprised when he heard the case had come off; had made no arrangements to come; had directed his family to have the books and papers ready where they could get them, and catch the train; that he does not think he owed the plaintiff, Simpkins, one dollar, and believes he would be able to have the court, either Judge Harvey or Judge Turley, wipe out the judgment on a fair trial. The error relied on by the plaintiff in error is the action of the court in refusing to vacate and set aside the judgment rendered against him under the circumstances. Did the court err in so ruling?

Now, while it is true that courts should seek as far as possible to avoid unnecessary delays in the trial of causes, and to promote the speedy administration of justice, and, in doing so, they are to a large extent clothed with discretion, yet that discretion should not be so exercised as to cause it to work a hardship or injustice to the parties litigant. Now, it will be noticed that Judge Harvey, in his testimony, says: "I said there at the dinner table, in the presence of these gentlemen, Mr. Shumate, Mr. White, and Mr. Shepherd, counsel for Mr. Simpkins, I understood that I didn't think it possible that that case would never come to trial, or something of that kind; that I didn't think it possible that that case would come up before Tuesday morning. Mr. Shumate agreed with me that he did not think it could come up." He also says the lawyers agreed on Tuesday as the day, and he acquiesced in it, but that remark may have applied to the cases of Sparks against the railroad company. Mr. Shumate, Mr. White, and Mr. Shephard, counsel for the plaintiff, were present. Mr. White acted upon this understanding, and instructed his witnesses accordingly, and says that he was surprised when informed that the case had been heard on Monday; that he had a good defense, and could show that he did not owe the plaintiff's claim, or any part of it. It is true, his attorney, Mr. Shumate, was in town, near the court house, when the case was called, on Monday; and when informed that the court was calling a jury in the case, feeling too unwell to go to the court house, he requested both Mr. Wilson and Mr. Wilkinson, attorneys (the latter of whom was generally employed by said White, but who was not attorney in this case), to go into court, and state the facts; and Mr. Marcum, attorney for Joseph Simpkins, in his testimony says that Mr. Wilkinson came in after the jury had been sworn, and told him what Mr. Shumate had said, that Mr. Shumate would not come in and interfere on account of Mr. Turley, but that he claimed that Judge Harvey had set the case for trial on Tuesday. Mr. Shumate, attorney for White, did not go to the court house; but, if he had gone, he could have done nothing more than Wilkinson did for him,—state his understanding that the case was to go over until Tuesday. White, acting on that understanding, had none of his witnesses there; and Mr. Shumate, in the absence of his client and his witnesses, would have been poorly prepared to try the case if he had gone to the court house, even if he had been free from sickness himself. Now, it is readily perceived from the testimony that the injustice which has been done to the defendant, White, in this case, was occasioned by the special judge being unacquainted with the agreement between counsel, in which Judge Harvey says he acquiesced. If Judge Harvey had been on the bench on Monday morning, that agreement would have been enforced, and the case would not have been called for trial until Tuesday; and, if White did not then have his witnesses present, it would have been his own fault, and he could not be heard to complain, as he is now doing, as we think with good cause.

The case of Mason v. McNamara, cited by counsel for the plaintiff in error (57 Ill. 274), states the law thus: "The well-settled practice in this State has been liberal in setting aside defaults at the term at which they were entered, when it appears that justice will be promoted thereby. The practice has not been so rigid as to require the party moving to set the default aside to bring himself within the strictest rules which govern applications in equity for new trials at law. In such cases the object is that justice be done between the parties, and not permit one party to obtain and retain an unjust advantage." Also, in Watson v. Railroad Co., 41 Cal. 17, the court says (page 20): "Applications of this character are addressed to the discretion—the legal discretion—of the court in which the default occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and, where the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." In Riley v. Emerson, 5 N. H. 531, it is said by the court: "Where counsel have suffered a verdict against a party without a trial by a mistake, a review may be granted." Again, in Neve v. Milns, 29 Eng. Law & Eq. 306, a cause was set down for

trial at the first sitting in Michaelmas term, and, no one appearing for the defendant, was taken at these sittings as an undefended cause, and verdict entered for the plaintiff. Upon affidavit by the defendant's attorney that he was under the impression that the cause would be tried at the second sitting in that term, and had made a memorandum according in his note book, the court granted a new trial. So, also, in De Rougigny v. Peale, 3 Taunt. 484, a new trial was granted where a cause had been undefended through mistake of the attorney. So, in Greatwood v. Sims, 2 Chit. 269, where in the call of the docket a case had been reached sooner than expected by the attorney, and went undefended on that account, a new trial was granted by Lord Chief Justice Ellenborough. Also the case of Bennett v. Jackson, 34 W. Va. 62, 11 S. E. Rep. 734, presents some features similar to the one under consideration. In that case it appears an action was brought in the county court in 1875. Two years thereafter it was transferred to the circuit court. No order except continuances was made in it after such transfer. The judge of said circuit court could not preside at the trial, and in 1887 the plaintiff, in the absence of the defendant and his counsel, caused a special judge to be elected; and, without the knowledge of the defendant, the case was tried, and a verdict and judgment rendered for the plaintiff. The defendant, being notified of such judgment, moved the court to set the same aside, because of the facts above stated; and, upon his affidavit alleging surprise and the full payment of the debt sued on, the circuit court set aside the judgment, and awarded the defendant a new trial, and it was held no error. In that case, as in this, there was the interposition of a special judge, who tried the case in the absence of the defendant, who was surprised by the appointment of the special judge, and had made no preparation for trial on that account, knowing that the regular judge would not try the case.

In the case we are considering, it appears that the regular judge would not have tried the case on Monday, the day on which it was tried if he had been on the bench, and the defendant knew he would not, on account of the agreement between counsel in his presence, which the regular judge says was acquiesced in by him, that the case should not be tried until Tuesday. The defendant, in his testimony, claims that he had a good defense to the action, and could have shown that he was not indebted to the plaintiff. The case under consideration presents some peculiar features, and, if the verdict and judgment are allowed to stand, the facts indicate that injustice will be done the defendant. Can we say that, under the circumstances, blame should attach to him for not being present on Monday with his witnesses and with his counsel, prepared for trial? The defendant testifies that his impression was, from the conversation he heard, that Judge Harvey would be back on Monday, and that the special judge would not take up his case, and that he did not know that Mr. Turley would sit on the bench, or that Mr. Shumate, his attorney, would refuse to try a case before him; that he was very much surprised when he heard the case had come off, and had made no arrangements to come. Considering these circumstances, it is apparent that the defendant has been deprived of an opportunity of presenting his defense, by reason of the special judge being unaware of the agreement made by counsel, in the presence of the regular judge; and by acting upon that agreement, which was made in his presence, the action of the special judge in hearing the case at a different day from the one agreed upon, without notice to the defendant, and in the absence of himself and witnesses, was such a surprise upon him that the motion to vacate the judgment, set aside the verdict, and award him a new trial, should have prevailed. The judgment complained of is reversed, the judgment vacated, the verdict set aside, and a new trial awarded, with costs to the plaintiff in error.

NOTE.—*New Trials—Surprise—Absence of Party.*—The principal case establishes the rule, that a clear case of mistake, or misinformation, as to the time for the trial of a cause, entitles the defendant to an order vacating the judgment and allowing him a new trial on the ground of surprise, provided the mistake or misinformation was not due to his negligence, and it appears that the defendant has a meritorious defense to the action. Cases in which "office judgments," or judgments for want of plea, have been opened and defendant allowed to plead, should be carefully distinguished from those in which, like the principal case, pleas or answers have been filed, and the cause put on the trial calendar. In the former class of cases the opening of the default is, in many of the States, almost a matter of course. The motion is addressed to the sound discretion of the court, and its action will not be disturbed unless a strong case is presented. Edsall v. Ayres, 15 Ind. 286; Cruse v. Cunningham, 79 Ind. 402. The burden is on the defendant, moving for a new trial, and he must furnish clear and indubitable proof of the alleged surprise. Spalding v. Crawford, 3 App. Cas. (D. C.) 361. The defendant's affidavit in support of the motion must show a meritorious defense, and that his presence would have produced a different result. Ferrill v. Marks, 76 Ga. 21. When a cause is liable to be called for trial at any time during the term, no particular day being set for the trial, the law devolves on the parties the duty of remaining present, until, by some positive action of the court, the cause is disposed of, or a disposition thereof is made by agreement with the adverse party. Speed v. Cocke, 57 Ala. 209. The parties, though non-residents, must advise themselves of the rules and practice of the court, as to fixing days for the trial of causes. Dusy v. Prudom, 95 Cal. 646, 30 Pac. Rep. 798. A new trial may be refused in the discretion of the court, where the defendant's default was caused by his attorney's negligence in failing to keep himself advised of the state of the trial calendar. Walsh v. Walsh, 114 Ill. 655. The negligence of the attorney will be imputed to his client. 1 Black, Judgments, § 341. For an exception to this last rule see case of Searles v. Christiansen (S. Dak.), 60 N. W. Rep. 29. A court in granting a new trial on

the ground of surprise, will be governed by precisely the same principles as a court of equity in relieving against a judgment in such cases. Renfro v. Merryman, 71 Ala. 195. But see the principal case on this point.

Illustrations—New Trials Granted.—The case of Ratliff v. Baldwin, 29 Ind. 15, 92 Am. Dec. 330, was very like the principal case. There the defendants had been in attendance upon the court with their counsel until informed by the judge that the case would not be tried at that term, and they thereupon returned to their homes. At a subsequent day an attorney of the court was appointed temporary judge in place of the regular judge, and he allowed the default. A new trial was granted. Failure to attend by reason of public notice from the presiding judge that no cases will be tried on a certain day, is excusable. Massey v. Allen, 48 Ga. 21. So where counsel was absent in consequence of an announcement by the presiding judge that there would be no peremptory call of the calendar. Anderson v. Scotland, 17 Fed. Rep. 667. A party who is misled by a remark of the court as to the time when his case will be called is entitled to a new trial. Sanders v. Hall, 37 Kan. 271; Clark v. Jarrett, 58 Tenn. 467; Edsall v. Ayres, 15 Ind. 286. The absence of the defendant in consequence of the irregular calling of the docket is ground for a new trial; and defendant need not show that he made any preparation, or that a different result would probably occur on another trial. Price v. Ford, 7 T. B. Mon. (Ky.) 399. This rule was applied in a case in which the court skipped a number of cases without continuing them. Donallen v. Lenox, 6 Dana (Ky.), 89. But this rule does not apply if it appear that the case was not heard at an earlier date than if the docket had been regularly called. International, etc. Ry. Co. v. Miller (Tex. Civ. App.), 28 S. W. Rep. 233. Where the term of court had been changed to an earlier date, and defendant's attorney, overlooking that fact, relied on the judge's assurance at a former term that nothing would be done in the case without notice to him, a new trial was granted. Jean v. Hennessy, 74 Iowa, 348; Buena Vista Co. v. Railroad Co., 49 Iowa, 657. So, where defendant arranged with the clerk of the court to notify him by telephone when his case would be called, which was done, but through a slight unnecessary delay defendant did not reach the court room until after the jury had assessed the plaintiff's damages. Hinman v. Hamilton Paper Co., 53 Wis. 169. New trials were granted in the following cases: In consequence of the fact that defendant left the court room because he had been informed that the judge had been of counsel in the case, and on that account no trial would be had at that term. Cruse v. Cunningham, 79 Ind. 402. Because of the fact that judgment was rendered at a special term, of which defendant had no notice. Joslin v. Coffin, 5 How. (Miss.) 539. Because of the failure of the clerk of the court to notify defendant of the time fixed for trial, according to his promise. Thompson v. Sharp, 17 Neb. 19; Seymour v. Miller, 32 Conn. 402. Because of counsel's inadvertent ignorance of the time set for trial. Dodge v. Ridenour, 62 Cal. 263. Misunderstanding of counsel as to the day fixed for the trial of the cause. Goodrich v. Handy (Ga.), 16 S. E. Rep. 108. Change of date for trial to a date one day earlier, without notice to the defendant. Leighton v. Dixon, 42 Kan. 616, 22 Pac. Rep. 732. Conversation with plaintiff's attorney in consequence of which defendant's attorney was led to believe that trial would be postponed. Symons v. Bunnell, 80 Cal. 330, 22 Pac. Rep. 193.

New Trial Refused.—The following grounds were held insufficient to sustain a motion for a new trial on the ground of surprise: The unexpected docketing of a cause, after a party had left court with his attorney and witnesses, he having had the right himself to docket the case. Renfro v. Merryman, 71 Ala. 195. Defendant's leaving the court in consequence of his belief from the state of the docket, and the opinion of others, including the presiding judge, that his case would not be reached at that term. White v. Ryan, 31 Ala. 400; Yelton v. Hawkins, 2 J. J. Marsh. (Ky.) 1. Miscalculation of the time at which a case will be reached on regular call of the docket. Warren v. Pentell, 63 Ga. 428; Simonton v. Buchanan, 58 Tenn. 467; Desnoyer v. Buchanan, 4 Minn. 515; Davis v. Winants, 18 N. J. L. 306; McAvley v. Lockert, 4 Humph. (Tenn.) 29; Brevard v. Graham, 2 Bibb (Ky.), 177; Sayer v. Finck, 2 Caines (N. Y.), 336; Stout v. Colver, 6 Mo. 254. Defendant's understanding that the criminal docket was being called, and that the court was not engaged in the trial of civil causes. Alamo Fire Ins. Co. v. Lancaster (Tex. Civ. App.), 28 S. W. Rep. 126. Ignorance of statutory time of holding court. Hartford, etc. Ins. Co. v. Vanduzen, 49 Ill. 489. Reliance on statement of plaintiff's attorney that a case then on trial in which he is engaged will occupy a certain time. Green v. Bulkley, 23 Kan. 130. An understanding between the parties that a day for trial should be fixed by agreement, such agreement not having been consummated before the regular call of the docket. Moody v. Harper, 53 Miss. 465.

CHAPMAN W. MAUPIN.

Washington, D. C.

JETSAM AND FLOTSAM.

Post. p. 265

"VIEWS" AND EVIDENCE.

The CENTRAL LAW JOURNAL for July 16, 1897, contains an article entitled: "Is What a Jury Sees Evidence When Ordered out by a Court to Make a View of Premises?" It appears that there has been some little controversy among text writers as to whether what the jury sees under such circumstances is to be classed as evidence or as simply an aid to the understanding of the evidence actually given in court. The author of the article in the CENTRAL LAW JOURNAL shows that, according to a number of decisions of various courts, what a jury sees under such circumstances is theoretically not to be ranked as evidence. The following language from the case of Close v. Samm, in the Supreme Court of Iowa, 27 Iowa, 503, will serve as an example of such judicial utterances:

"This inspection by the jury was ordered under the revision, section 3061. 'Whenever, in the opinion of the court, it is proper for the jury to have a view of the real property which is the subject of controversy, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose; while the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.' The question then arises as to the purpose and intent of this statute. It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony

of the witnesses respecting the same; and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as being against the evidence, or even refuse to set it aside without knowing the facts ascertained by such personal examination by the jury? It is a general rule, certainly, if not universal, that the jury must base their verdict upon the evidence delivered to them in open court, and they may not take into consideration facts known to them personally, but outside of the evidence produced before them in court. If a party would avail himself of the facts known to a juror, he must have him sworn and examined as other witnesses."

The distinction taken in this and other cases may be sound from the standpoint of pure theory. But it must be clear that in practice the distinction will amount to little or nothing, no matter how explicitly the court may instruct the jury that the view is intended as an aid to the comprehension of evidence and its results are not evidence itself. Indeed, the view will necessarily often be more influential in determining the verdict than the evidence proper. It would, for instance, be idle to expect a jury to go only according to the evidence and disregard the effect of their view, where a question was raised whether certain premises were swamp or dry land on a date previous to the trial, as was the case in Wright v. Carpenter, 49 Cal. 607. There the court said that instructions given on the trial were erroneous in so far as they authorized the jury to take into consideration the result of their own examination of the land, in determining its character as swamp, overflow or otherwise. But if the trial court had correctly instructed the jury that the view was simply to enable them to understand the evidence, it is highly improbable that the jurors could have eliminated the evidence of their senses as a potential factor in determining their verdict.

It must be obvious that the question of real substantial interest is whether the discretion vested in trial courts to order views by juries (N. Y. Code Civil Procedure, section 1659) should be frequently or sparingly exercised. Conceding that occasional injustice may result, we are inclined to believe that in the long run the best interests of the greatest number will be subserved by allowing a view to be had by the triers of facts whenever it may fairly be said to be necessary for a full comprehension of the evidence. The jury in such cases will undoubtedly derive impressions which will not get into the record nor appear in the case on appeal. But these are not unlike certain impressions of the personalty and appearance of witnesses, which are not required to be definitely formulated and, of course, do not appear in the record, but which jurors may legitimately give weight to in passing upon questions of veracity.

According to the weight of authority the theoretical distinction between evidence and an aid to the comprehension of evidence seems to exist. And it would therefore seem to be the duty of trial courts to instruct juries as to such distinction. As above indicated, the distinction will not be apt to be of much practical effect, but we do not think such consideration should dispose trial courts to incline against granting views in proper cases. Of course, if the jurors should talk with outsiders at the scene of the view about the case, another question would be presented. See People v. Gallo, 149 N. Y. 106.—*New York Law Journal.*

HUMORS OF THE LAW.

A South Carolina trial justice recently made the following disposal of a case that came before him: "I am acting in a dual capacity in this case—sitting as a jury to try the facts, and as a judge to expound the law. As a jury I am unable to agree upon a verdict on the facts, and, therefore, as a judge I order a mistrial."

A Frenchman was convicted of killing his mother-in-law. When asked if he had anything to say for himself before taking sentence, he said, "Nothing, excepting I lived with her twenty-one years and never did it before."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Account—Charges.—Under How. Ann. St. § 5958, providing that an executor shall be allowed "all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as the law provides, together with all extra expenses," an executor may procure the aid of legal advisers, when necessary, and bind the estate for the payment of a reasonable compensation for their services.—JACKSON V. LEECH'S ESTATE, Mich., 71 N. W. Rep. 846.

2. ADMINISTRATION—Allowance to Executor.—An allowance to an executor for extraordinary services in the administration of the estate is within the discretion of the trial judge.—DOTY V. KING'S ESTATE, Mich., 71 N. W. Rep. 1080.

3. ADMIRALTY — Powers of Part Owners.—A part owner of a vessel cannot, as such, bind his co-owner for necessary repairs or supplies, after the latter has given him notice to incur no further expense on the vessel.—ATKINS v. LEWIS, Mass., 47 N. E. Rep. 507.

4. ADMINISTRATION—Sale—Bona Fide Purchaser.—A grantee of a purchaser at an administrator's sale obtains a good title, though the sale was collusive and fraudulent, where such grantee has no notice of any irregularity or information sufficient to put him on inquiry.—ADLER GOLDMAN COMMISSION CO. v. CLEMONS, Ark., 41 S. W. Rep. 417.

5. APPEAL — Record.—The longhand manuscript of the evidence is not a part of the record unless it affirmatively appears that it was filed with the clerk of the lower court before it was incorporated in the bill of exceptions.—CITIZENS' ST. R. CO. v. SUTTON, Ind., 47 N. E. Rep. 462.

6. APPEAL FROM JUSTICE—Notice.—A notice of appeal from a justice court, required by Rev. St. § 3754, is insufficient where it does not show the amount of the judgment or the costs, or both, nor the date of the same.—CLUNE v. WRIGHT, Wis., 71 N. W. Rep. 1041.

7. ASSIGNMENT OF RENT—Validity.—An assignment of rents of mortgaged property, to be recovered by the mortgagee and applied upon the mortgage, is valid.—KELLY v. BOWERMAN, Mich., 71 N. W. Rep. 836.

8. ATTACHMENT — Debt not Due in Part.—Where a part of a debt is due, and a part is not, the writ of attachment may stand as to the former, and be dismissed as to the latter, where the affidavit required by Rev. St. § 2731, where attachment is sued for the debt not due is not filed, but it cannot be quashed on motion.—HUBBARD v. HALEY, Wis., 71 N. W. Rep. 1036.

9. ATTACHMENT—Fraud—Corporations.—A finding in attachment that a corporation had disposed of, and was about to dispose of, its property, with intent to defraud its creditors, is sustained by evidence that substantially all the stock was owned by the president, who practically exercised all the powers of the corporation; that he kept no systematic books of account, and ran the corporate business with his own mingling their assets, and using the corporate funds in his individual business, when he knew, or should have known, that the corporation was insolvent.—SENOUR MANFG. CO. v. CLARKE, Wis., 71 N. W. Rep. 883.

10. ATTACHMENT—Substituted Service.—Under How. Ann. St. §§ 6840, 6841, fixing the time of service of a writ of attachment by a constable as at least six days before the return thereof, and providing for substituted service in case the defendant cannot be found in the county, a substituted service made on the last day on which the principal defendant could have been served is good.—FORSLUND v. MATTHEWS, Mich., 71 N. W. Rep. 854.

11. ATTACHMENT—Wrongful Attachments.—Two several creditors having caused writs of attachment to be levied on the property of their common debtor, the debtor thereupon sued one of the attaching creditors to recover damages for the wrongful levies, in which action the declaration was broad enough to cover the taking of all the property so attached, and therein recovered a judgment against such creditor, and collected the judgment: Held, that such recovery and satisfaction as against one of the creditors barred the claim of the debtor, as against the estate of the other creditor, on account of the same alleged wrong.—GRIMES v. WILLIAMS' ESTATE, Mich., 71 N. W. Rep. 835.

12. BAILMENT—Assignment by Bailor.—Where the bailor assigned the property, and the bailee afterwards delivered it to him, and the assignee sued the bailee for conversion, it was error to exclude evidence that the assignee had given the bailee notice of the assignment before the delivery.—MCGEE v. FRENCH, S. Car., 27 S. E. Rep. 487.

13. BENEVOLENT SOCIETY—Insurance—Beneficiary.—A sister, who has been named as beneficiary in her brother's benefit certificate, under a written agreement executed by her at the time that the fund shall, upon her receipt therefor, be paid over by the order to the executor of the member's will, to be distributed thereunder, cannot herself, nor can her executor after her death, repudiate that agreement, though the law of the order provides that the fund shall constitute no part of the member's estate, and that he shall have no control thereof except to designate the beneficiaries, the agreement reciting as the consideration therefor a bequest made to the beneficiary in the member's will.—PEEK'S EXR. v. PEEK'S EXR., Ky., 41 S. W. Rep. 434.

14. BILLS AND NOTES—Assignment of Forged Note.—The assignee of a note which is a forgery as to one of the obligors does not waive his right of action against the assignor by presenting the note as a claim against the assigned estate of the other obligor, and receiving dividends thereon.—SPALDING v. GATES, Ky., 41 S. W. Rep. 440.

15. BILLS AND NOTES—Negotiable Note—What Constitutes.—A bill of exchange providing for the payment of "exchange" in addition to principal and interest is not negotiable by the law merchant, and one who purchases the same before maturity, for value, and without notice of any defense thereto, takes it subject to the defense of want of consideration, good as between the original payor and payee.—NICELY v. WINNEBAGO NAT. BANK OF ROCKFORD, ILL., Ind., 47 N. E. Rep. 476.

16. BONA FIDE PURCHASER.—A party cannot execute a negotiable note and a mortgage collateral thereto, and make the security good in the hands of a purchaser of the negotiable paper before due, when the mortgagor had no title at the time in the land, and an examination of the record would have disclosed that fact.—LOCKWOOD v. NOBLE, Mich., 71 N. W. Rep. 856.

17. CARRIERS OF GOODS—Limitation of Liability.—A contract exempting a carrier from loss by fire, "unless it could be shown that such loss accrued through negligence," imposes the burden of proving negligence on the shipper, where the loss has occurred by fire.—SCHALLER v. CHICAGO & N. W. RY. CO., Wis., 71 N. W. Rep. 1042.

18. CHATTEL MORTGAGE—Waiver of Lien.—Where one who holds a mortgage on personal property sues out an attachment against the mortgagor, and causes it to be levied upon the mortgaged property, it amounts to a waiver of the mortgage lien.—COX v. HARRIS, Ark., 41 S. W. Rep. 426.

19. CONTRACT — Attorney and Client.—In an action upon a contract, the court was asked to charge the jury that, unless the minds of the parties met upon the alleged contract, there could be no recovery. This request was given, but the judge gave the jury to understand that the minds of the parties met upon that contract, or the one testified to by the defendant: Held error, where there was evidence of a misunderstanding between the parties.—SHAKESPEARE v. BAUGHMAN, Mich., 71 N. W. Rep. 874.

20. CONTRACTS—Consideration.—Payment of part of the price, and a promise to pay the balance if an option to purchase was exercised, are a sufficient consideration for a personal agreement by the seller's agent to return the payment with interest if the option was not exercised.—WHITE v. TAYLOR, Mich., 71 N. W. Rep. 871.

21. CONTRACT—Construction.—An agreement to build and operate a factory with a capacity of "ten new box cars per day" means 10 cars in an ordinary working day, and is not performed by constructing a plant capable of turning out that number of cars in 24 hours, by running night and day, with two shifts of men.—FAY & EGAN CO. v. BROWN, Wis., 71 N. W. Rep. 895.

22. CONTRACT—Rescission—Estoppel.—Where defendant knew that plaintiff was relying upon the representations which he made that the mortgage was a first lien, it does not lie with him to charge plaintiff with negligence in not ascertaining from the abstract that

there was a prior mortgage. — CORNELL v. CRANE, Mich., 71 N. W. Rep. 878.

23. CONTRACT — Rescission — Misrepresentations.—A purchaser cannot rescind his contract though the vendor represented that it had made arrangements with a railroad to build a station near the lots sold, such arrangements having been made, and the vendor not being responsible for the railroad's default in not building.—LAMBERT v. CRYSTAL SPRING LAND CO., Va., 27 S. E. Rep. 462.

24. CONTRACTS—Seal—Corporations.—The mere presence of what purports to be the seal of a corporation on a contract that would be valid and binding though not under seal, unaccompanied by anything to show that the company's officers intended to or did affix the corporate seal, is insufficient to have any effect on the apparent character of the contract, and does not render demurrable a declaration thereon in *assumpsit*. —GRUBBS v. NATIONAL LIFE MATURITY INS. CO., Va., 27 S. E. Rep. 464.

25. CONTRACT — Subscription — Construction—Apportionment of Loss. — A certain subscription, by which, in substance, each signer agrees to pay the sum set opposite his name, to defray any loss or excess of expenses above receipts of a certain public enterprise about to be undertaken, held, from its language, to require a *pro rata* apportionment of such loss among all the subscribers; and, in an action to recover on such subscription, a complaint which does not show the amount of such loss and the total amount subscribed, and merely alleges that an assessment was duly made, does not state a cause of action: Held, further, the signers of the instrument are not joint promisors, but can be sued separately.—LARAMEE v. TANNER, Minn., 71 N. W. Rep. 1028.

26. CORPORATIONS—Stockholder's Bill for Receiver.—A bill by a stockholder for the appointment of a receiver cannot be sustained where it declares no contest concerning property, no dispute of any kind between the parties, and no dereliction in duty by the corporation or its officers, but merely alleges its insolvency, the recovery of certain judgments against it from which it desires to appeal, but which it will be unable to supersede because of its insolvency, and that its assets will be wasted if sold under such judgments.—BECKER v. HOKE, U. S. C. C. of App., Seventh Circuit, 80 Fed. Rep. 973.

27. COUNTIES—Liabilities.—Where a sheriff, having a warrant for the arrest of a man charged with felony, took the horse of a citizen, and pursued and overtook the felon, and the horse was overdriven and injured, the county is not liable for the value of the horse.—RANDLES v. WAUKESHA COUNTY, Wis., 71 N. W. Rep. 1064.

28. COUNTIES—Taxation—Townships.—A township in a county under township organization is an independent corporate entity,—a municipal corporation,—within the meaning of section 6 of article 9 of the constitution, its existence authorized by that instrument, and clothed by law with power to assess taxes upon property within its jurisdiction for such purposes as the legislature has declared to be township purposes.—CHICAGO, B. & Q. R. CO. v. KLEIN, Neb., 71 N. W. Rep. 1069.

29. COVENANTS—Incumbrances.—Where, in a deed or mortgage, it is recited that the real property therein described is sold or mortgaged subject to a certain specified and existing incumbrance, such recital qualifies subsequent covenants of seisin, quiet enjoyment, and of general warranty, and they do not cover or embrace the incumbrance mentioned. — WALTHER v. BRIGGS, Minn., 71 N. W. Rep. 909.

30. COVENANTS—Liability of Coparcener.—One is not bound by covenants in a deed for the sole reason that they are made by a cotenant or a coparcener holding the record title. — JONES v. CHAPMAN, Tex., 41 S. W. Rep. 527.

31. CRIMINAL LAW — Disturbance of Public Assemblage.—Rev. St. § 4597, providing that any person who shall willfully interrupt "any assembly or meeting of people for religious worship or for other purposes, lawfully and peacefully assembled, shall be punished by fine," etc., embraces any lawful and peaceful assembly.—VON RUEDEN v. STATE, Wis., 71 N. W. Rep. 1048.

32. CRIMINAL LAW—False Pretenses. — Where the officer of a corporation, by false and fraudulent statements, induces certain persons to purchase worthless stock in the corporation, he is guilty of obtaining money under false pretenses, though the title to the money obtained passed to the corporation.—COMMONWEALTH v. LANGLEY, Mass., 47 N. E. Rep. 511.

33. CRIMINAL LAW—Forgery—Indictment.—An indictment charged that defendant did falsely, etc., make, forge, counterfeit, and utter a certain promissory note, with intent to feloniously, falsely, and fraudulently defraud, etc.: Held not to charge two offenses, under Rev. St. 1894, § 2354, providing that whoever falsely makes, alters, forges, etc., any promissory note, etc., with intent to defraud, or utters or publishes as true any such instrument, knowing the same to be false, with intent to defraud, shall be imprisoned in the State prison, etc.—STATE v. FIDLER, Ind., 47 N. E. Rep. 464.

34. CRIMINAL LAW—Involuntary Manslaughter.—One who intentionally points the muzzle of a pistol at another violates Rev. St. 1894, § 2068 (Rev. St. 1881, § 1984), making it a misdemeanor to "draw" a pistol upon another person; and if the weapon is unintentionally discharged, and kills the person at whom it is pointed, the other is guilty of involuntary manslaughter, which consists (Rev. St. 1894, § 1981; Rev. St. 1881, § 1908) in killing a person "involuntarily, but in the commission of some unlawful act." — SIBERRY v. STATE, Ind., 47 N. E. Rep. 458.

35. CRIMINAL LAW—Pardon — Costs.—Defendant was convicted of assault, fined, and sentenced to jail. The governor granted a pardon, which provided that defendant was pardoned of the offense so far as related to the fine and imprisonment, but in no other way interfered with the judgment and sentence of the court, and directed that defendant be forthwith liberated: Held, that pursuant to Shannon's Code, § 7417, the court might remand defendant to jail until he should pay, secure, or work out the costs adjudged, since the governor did not have the power to discharge the costs, nor did he attempt to do so.—STATE v. SPELLINGS, Tenn., 41 S. W. Rep. 444.

36. CRIMINAL LAW—Removing Mortgaged Property.—An indictment under Sand. & H. Dig. § 1868, providing that "it shall be unlawful for any person to sell, or otherwise dispose of," or remove, incumbered property, need not name the person to whom the property was sold.—STATE v. CRAWFORD, Ark., 41 S. W. Rep. 425.

37. DEED—Power of Attorney.—A deed from one who has power of attorney to sell passes title, though he does not refer to such power, and has no estate in the land so conveyed.—HILL v. CONRAD, Tex., 41 S. W. Rep. 541.

38. EJECTMENT — Defenses.—One defending in ejectment, claiming that he was placed in possession by the national government, must show the government's right to be paramount to that of plaintiff, to defeat a recovery. — SCRANTON v. WHEELER, Mich., 71 N. W. Rep. 1091.

39. EJECTMENT — Legal Defense — Trust Deed. — In ejectment, where plaintiffs claimed as purchasers at a sale made under a deed of trust securing notes and executed by one of defendants to plaintiffs, it was not a legal defense that before the sale, but after default, defendants tendered to plaintiffs the amount due on the notes, since such tender did not discharge the lien of the deed of trust.—HUDSON BROS. COMMISSION CO. v. GLENCOE SAND & GRAVEL CO., Mo., 41 S. W. Rep. 450.

40. EMINENT DOMAIN — Lands of Married Woman.—The taking of land for public use is not in the nature of a conveyance, but is the exercise of the superior

title of the government, and hence the appropriation of the lands of a married woman is completed by decision by proper authority to take the land and the payment of compensation, however effected; compliance with the requirements as to conveyances by married women being unnecessary.—CITY OF SAN ANTONIO v. GRANDJEAN, Tex., 41 S. W. Rep. 477.

41. EVIDENCE — Character—False Arrest.—Character of plaintiff cannot be shown in an action for false arrest, it not being directly in issue, though the defense is that plaintiff committed a crime,—GEARY v. STEVENSON, Mass., 47 N. E. Rep. 508.

42. EVIDENCE—Damages—Statements as to Suffering.—Statements of plaintiff in respect to the pain which he suffers, made to a physician who examined him for the sole purpose of testifying as an expert on his behalf at the trial, are inadmissible in a suit for personal injuries.—TYLER S. E. RY. CO. v. WHEELER, Tex., 41 S. W. Rep. 517.

43. EVIDENCE — Declarations.—Statements by a witness out of court, inconsistent with his testimony, are not substantive evidence of the facts stated.—ENO v. ALLEN, Mich., 71 N. W. Rep. 842.

44. EVIDENCE—Expert Witnesses.—It was competent to submit to the jury an X ray photograph, taken by a surgeon, showing the overlapping bones of one of plaintiff's legs where it was broken at the time of the accident, where the surgeon was familiar with the process by which the impression was secured, as well as with fractures, and testified that the photograph accurately represented the condition of the leg at the point of fracture, and that, by the aid of the X rays, he was enabled to see the fracture and overlapping as if they were uncovered to the sight.—BRUCE v. BEALL, Tenn., 41 S. W. Rep. 445.

45. EVIDENCE AT FORMER TRIAL—Death of Witness.—Where a witness in justice court died before the trial in the circuit court, to which an appeal had been taken, it was proper to prove in the circuit court what he had testified to in justice court.—DETROIT BASEBALL CLUB v. PRESTON NAT. BANK, Mich., 71 N. W. Rep. 833.

46. EXECUTION AGAINST ONE PARTNER—Levy on Firm Property.—While an execution creditor of an individual partner may levy upon the interest of the execution debtor in the partnership property, such interest must be treated as consisting of a right to an aliquot share of what remains after the payment of the partnership debts, and the adjustment of accounts between the partners.—KUNZE v. COX, Mich., 71 N. W. Rep. 864.

47. EXPERT TESTIMONY — Opinion Evidence—Mental Condition.—A witness may be asked whether or not her sister, with whom she is intimate, has "failed in her mental capacity during the past five years."—CLARK v. CLARK, Mass., 47 N. E. Rep. 510.

48. FRAUDULENT CONVEYANCES.—Where a wife, without knowledge of her husband, purchases a lot, and it is paid for by the earnings of the wife and the husband, and the title is taken in his name, and held by him for 25 years, and no attempt is made to put it in the name of another until the husband becomes involved, a transfer at that time of the title to the wife is in fraud of creditors.—TOWNSHIP OF MAPLE VALLEY v. FOLEY, Mich., 71 N. W. Rep. 1086.

49. FRAUDULENT CONVEYANCES — Consideration.—Though no trust results in favor of one paying the consideration for a conveyance to another (2 How. Ann. St. § 5569), where a husband pays for a conveyance of land to his wife, with an understanding that it is thereafter to be so conveyed as to vest title in them jointly, a conveyance by her in pursuance of such understanding is, in the absence of fraud, valid as against her creditors.—DESMOND v. MEYERS, Mich., 71 N. W. Rep. 877.

50. FRAUDULENT CONVEYANCES—Evidence.—In an action to satisfy a judgment against the husband out of land which is in the wife's name, on the ground that property was purchased by funds furnished by the husband, when it is shown that he could not have furnished them, and the proof is that she was engaged in a business from which resources might reasonably be expected with which to make the purchase, the presumption that the husband furnished the money has been repelled.—KINNIER'S ADMR. v. WOODSON, Va., 27 S. E. Rep. 457.

51. GARNISHMENT—Judgment against Garnishee.—A judgment against the garnishee, when there has been no judgment against the defendant in the suit to which the garnishment is ancillary, is void.—SHOEMAKER v. PACE, Tex., 41 S. W. Rep. 498.

52. GARNISHMENT — Set-off.—A garnishee may plead as a set-off a note against the defendant assigned to him prior to the institution of the action.—KELLY v. TALBOTT, Ky., 41 S. W. Rep. 439.

53. GUARANTY — Construction.—A guaranty of the "collection" of a note is not a guaranty of its payment, and the guarantor is not subject to suit until the remedy against the maker of the note has been exhausted, unless it is alleged and shown that for some cause the note is uncollectible from the maker, and that the pursuit of the remedy against him would be fruitless.—TEXAS CITY IMP. CO. v. GRISWOLD, Tex., 41 S. W. Rep. 513.

54. GUARANTY — Notice of Acceptance.—Where a guaranty of a third person is not accepted by the seller until he investigates as to the guarantor's responsibility, he is not liable thereon, without notice of acceptance.—DE CREMER v. ANDERSON, Mich., 71 N. W. Rep. 1090.

55. HAWKERS AND PEDDLERS—License Fee.—Act 1893, requiring hawkers and peddlers of goods to pay a license fee, does not apply to local merchants who carry a stock, and at their store take orders for sewing machines, and deliver them in the country, though their agent, while in the country filling orders, occasionally sells from the delivery wagon a new machine or an old one taken in trade.—ALEXANDER v. GREENVILLE COUNTY, S. Car., 27 S. E. Rep. 469.

56. INJUNCTION—Restraining Enforcement of Judgment.—A party cannot have relief in equity against the enforcement of a law judgment, unless he has matter of defense which was not available in the law action, or had a good defense at law, which, by fraud or accident, without negligence on his part, he did not present in the law action.—LOSEY v. NEIDIG, Neb., 71 N. W. Rep. 1067.

57. INSOLVENCY — Preferred Claims for Labor.—Employees of a newspaper corporation, whose work consists of writing editorials, the preparation of copy for the printers, the direction of the make-up of the paper, proof reading, reporting, and gathering news, being engaged in intellectual, rather than manual, labor, are not entitled to claim the benefit of 3 How. Ann. St. § 8749*m*, which provides "that all debts which shall be owing for labor by any corporation at the time it shall become insolvent, shall be preferred claims against the estate of such insolvent debtor."—MICHIGAN TRUST CO. v. GRAND RAPIDS DEMOCRAT, Mich., 71 N. W. Rep. 1102.

58. INSURANCE—Agent — Contracts.—Where the general agent of an insurance company agreed to pay an incoming partner "one-half of the renewal commissions on all new business secured and placed on the books of this agency from and after January 1, 1891, as long as he remains with this agency," the right to renewal commissions ceased with the dissolution of the partnership by the retirement of such partner.—HOUGHTON v. BRADLEY, Mich., 71 N. W. Rep. 1112.

59. INSURANCE — Employer's Liability.—Under a policy providing for payment to the insured of all sums which he "may become liable for in damages" for personal injuries, and that the insurer shall have charge of all litigation against the insured for such damages, the liability of the insurer accrues when that of the insured for certain damages has been finally determined, though he has not paid the same.—FIDELITY & CASUALTY CO. v. FORDYCE, Ark., 41 S. W. Rep. 420.

60. INSURANCE — Subrogation.—An insurance company cannot be subrogated, in case of loss, to the insured's right of action for damages against one who sold him the insured property through fraudulent representations of its value.—FARMERS' FIRE INS. CO. v. JOHNSTON, Mich., 71 N. W. Rep. 1074.

61. INSURANCE POLICY—Conditions.—A condition that a policy shall be void in case of false swearing by the insured touching any matter relating to the insurance after loss is not violated except when the false statement is willful.—PHOENIX INS. CO. v. SWANN, Tex., 41 S. W. Rep. 519.

62. INTOXICATING LIQUORS — Illegal Sale.—An indictment under Sand. & H. Dig. § 4881, making it a misdemeanor for any person owning or controlling a house to keep for sale therein liquors, the indictment must give a description of the house in which the liquors were kept, and must prove as alleged.—ADAMS v. STATE, Ark., 41 S. W. Rep. 423.

63. JUDGMENT—Amendment after Verdict.—Plaintiffs brought action to recover for the death of their alleged son, and recovered judgment. Defendant moved for a new trial, submitting affidavits to show that he was the son only of the wife: Held, under Rev. St. 1889, § 2100, prohibiting the court from allowing any amendment after verdict affecting prejudicially the rights of the adverse party, that it was error to strike out the name of the husband, and allow the judgment to stand in the name of the wife alone.—HABEL v. UNION DEPOT RY. CO., Mo., 41 S. W. Rep. 459.

64. JUDGMENT—Revival.—A proceeding to revive a judgment being a collateral proceeding, no error in such judgment is available against it, if the court which rendered it was duly organized, and had jurisdiction of the subject-matter and the parties.—FOSTER v. CRAWFORD, U. S. C. C., D. (Ind.), 80 Fed. Rep. 991.

65. JUDICIAL SALES—Setting Aside Judgment.—The setting aside of a judgment, regular upon its face, had in a court of competent jurisdiction, and not affecting the title or estate in real estate, does not avoid a judicial sale of real estate, under an execution issued thereon, made to a stranger, who had purchased in good faith for a valuable consideration.—BRANLEY v. DAMBLY, Minn., 71 N. W. Rep. 1026.

66. LANDLORD AND TENANT—Assignment of Lease.—Where a third party is in possession of leased premises under the lessee, the law presumes that the lease has been assigned by the lessee to such third party, and, in a suit against him for rent, the burden is on him to explain the character of his possession; such burden is also on his assignee in insolvency. This rule is not changed by the fact that the lease contains a condition of forfeiture in case of such an assignment by the lessee.—DICKINSON CO. v. FITTERLING, Minn., 71 N. W. Rep. 1030.

67. LIFE INSURANCE—Suicide.—Rev. St. ch. 89, art. 3, § 5869, provides that associations doing a life or casualty insurance business on the assessment plan shall not be subjected to any other provisions of the general insurance laws except as set forth in such article: Held, that such companies are not governed by Rev. St. 1889, § 5855, providing that in suits on policies of life insurance it shall be no defense that the insured committed suicide, unless he contemplated suicide at the time he made his application, any stipulation in the policy to the contrary notwithstanding; such section not being incorporated in said article 3.—HAYNIE v. KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO., Mo., 41 S. W. Rep. 461.

68. LIMITATIONS—Burden of Proof.—Where a plea of limitations is traversed, the burden is on plaintiff to show that his claim is not barred.—LEIGH v. EVANS, Ark., 41 S. W. Rep. 427.

69. MANDAMUS—Reinstatement of Pupil.—A petition in *mandamus*, seeking to compel the principal, the superintendent, and the trustees of a school to reinstate a boy in the school, is insufficient, where it does not set forth all the facts so that it might appear whether or not the suspension of the boy was wrong and where there is no averment that application was made to any of the school authorities to have the boy reinstated.—COCHRAN v. PATILLO, Tex., 41 S. W. Rep. 537.

70. MARRIAGE — Validity.—Where it appears that a marriage ceremony without license was performed between a man and woman, and that they subsequently lived together for years as husband and wife, a valid common-law marriage is established; and the woman cannot, during the life-time of her common-law husband, contract a valid statutory marriage with another man.—CHAPMAN v. CHAPMAN, Tex., 41 S. W. Rep. 533.

71. MARRIED WOMEN—Suretyship—Estoppel.—Where a married woman signed a mortgage as surety, the mere fact that it recited that it was made for the benefit of her separate estate did not estop her from denying that fact as against the mortgagee or an assignee of the mortgage who took the assignment in consideration of a past indebtedness due to him from the mortgagee.—EAGAN v. RAYSOR, S. Car., 27 S. E. Rep. 475.

72. MASTER AND SERVANT—Contributory Negligence.—Plaintiff entered a little room, where machinery was running (he having started it himself), without a light, although he knew that it was dangerous to approach the running machinery in the dark. He then mounted a stepladder, and leaned over the running machinery. His loose jacket caught in the machinery, and he was injured: Held, that the court below properly directed a verdict for the defendant.—SAKOL v. RICKEL, Mich., 71 N. W. Rep. 833.

73. MASTER AND SERVANT — Fellow-servant.—A railroad company is not liable for injuries to a section hand caused by the negligence of the section foreman, where the negligent act is done by the foreman as a laborer in a common work with the person injured.—ILLINOIS CENT. R. CO. v. BOLTON, Tenn., 41 S. W. Rep. 442.

74. MASTER AND SERVANT — Negligence—Dangerous Machinery.—A master is not bound to warn an employee of ordinary intelligence, and considerable experience at such a machine as he was working at, of the danger from cogwheels which were uncovered and in sight, if he attempted to grasp a lever without noticing where his hand was going.—WILSON v. MASSACHUSETTS COTTON MILLS, Mass., 47 N. E. Rep. 506.

75. MASTER AND SERVANT—Railroad Appliances—Assumption of Risk.—A railroad company or a receiver operating a railroad owes no duty to its or his servants to provides cars or engines of but one pattern, and any risk arising from an obvious difference in construction of particular cars or engines from those to which they are accustomed is assumed by such servants.—PIERCE v. BANE, U. S. C. C. of App., Seventh Circuit, 80 Fed. Rep. 988.

76. MORTGAGES—Foreclosure—Deficiency Judgment.—Where the holder of a second mortgage on real estate forecloses the same, a deficiency judgment should be given him for the balance due on his second mortgage, and not for the amount due on the first mortgage and such balance.—KASSON v. TOUSEY, Wis., 71 N. W. Rep. 894.

77. MORTGAGES—Intermediate Judgment Creditors.—On the maturity of notes secured by first mortgage on realty, the amount due was borrowed by the mortgagor from a third person, under an agreement for a first lien on the realty. A mortgage to him was executed and recorded, and, to avoid complications, the money was paid directly to the holder of the matured notes, and they were delivered to the last mortgagee uncanceled, the original mortgage remaining unreleased: Held that, as against intermediate judgment creditors of the mortgagor, the last mortgagee was subrogated to the lien of the original mortgage.—BANKERS' LOAN & INVESTMENT CO. v. HORNISH, Va., 27 S. E. Rep. 459.

78. MORTGAGES—Merger—Liability of Mortgagor.—An assignee of a mortgage who has acquired the title of a

vendee from the mortgagor, who assumed the mortgage, may, if third persons are not thereby prejudiced, sue the mortgagor for the mortgage debt; but in such case the land is the primary fund for its payment.—HARRIS V. MASTERSON, Tex., 41 S. W. Rep. 482.

79. MORTGAGES — Mistake in Description.—A mortgage describing the property as two lots on a certain street of a certain frontage and depth, is sufficient to give a lien, as against subsequent attaching creditors, on the only two lots owned by the mortgagor on that street of that width and depth, notwithstanding a mistake in reciting the particular conveyance under which the mortgagor held title, or the number of the lot of the subdivision of which they formed a part, the description given being sufficient to furnish the means of identification.—ASHLAND BLDG. & SAV. ASSN. V. JONES, Ky., 41 S. W. Rep. 437.

80. MORTGAGES—Redemption by Life Tenant.—A life tenant in a portion of the estate mortgaged can, if the mortgagee object, redeem only by paying the entire mortgage, though, if she file bill to redeem the entire mortgage, the mortgagee may allow her to redeem by paying only her proportional share; but, if she has to pay the entire mortgage, she is entitled to possession of the entire estate till repaid, by the rents and profits, or otherwise, the amount paid above her proportional share.—KERSE V. MILLER, Mass., 47 N. E. Rep. 504.

81. MORTGAGE FORECLOSURE — Easement.—A mortgagee had an easement denominated "water privileges, for house, barn, and sprinkling purposes, from the well located" on the property. She foreclosed the mortgage, but did not set up the easement in her complaint: Held, that the purchaser at foreclosure sale took the property free of the easment.—REMBERT V. WOOD, Tex., 41 S. W. Rep. 525.

82. MUNICIPAL BONDS—Levy of Tax to Pay.—Const. § 159, providing that whenever any city is authorized to contract an indebtedness it shall be required at the same time to provide for the collection of an annual tax sufficient to pay the interest and to create a sinking fund, is to be read into Ky. St. § 3010, authorizing cities of the first class to refund outstanding bonds, and the city, in providing for new bonds to refund an existing indebtedness, may provide by ordinance for the levy of a tax as provided by the constitution.—COMMISSIONERS OF SINKING FUND OF LOUISVILLE V. ZIMMERMAN, Ky., 41 S. W. Rep. 428.

83. MUNICIPAL CORPORATIONS — Claims.—Laws 1889, ch. 326, § 58, as amended by Laws 1893, ch. 312, § 27, and Laws 1889, ch. 326, §§ 59, 60, provide that no action lies against a city on "any claim or demand of any kind or character whatsoever" until it has first been disallowed in whole or in part by the common council, and that the determination of the council disallowing a claim is a bar to any subsequent action in any court on the claim, unless appealed from within 20 days: Held to apply to a cause of action for negligence in supplying plaintiff with tools while in the employ of the city.—MCCUE V. CITY OF WAUPUN, Wis., 71 N. W. Rep. 1054.

84. MUNICIPAL CORPORATIONS — Powers—Purchasing Land.—A municipal corporation may lawfully purchase, on credit or otherwise, and hold, all the real estate necessary to the proper exercise of the powers conferred on it, and may bind itself by the execution of non-negotiable notes as evidence of indebtedness for such real estate.—RICHMOND & W. P. LAND, ETC. CO. V. TOWN OF WEST POINT, Va., 27 S. E. Rep. 460.

85. MUNICIPAL CORPORATION—Private Sewers—Rights of Owners.—Where a city, by its charter, has the power to make drains, and compel owners of occupied lots to connect the same with the public sewers, and to prescribe the form and construction of private drains, it can grant to a citizen the right to construct a private sewer in the street at his own expense, which, when constructed by him, may be used without interference by other citizens without his consent.—BOYDEN V. WALKLEY, Mich., 71 N. W. Rep. 1099.

86. MUNICIPAL CORPORATION—Street Railways—Franchises.—Where a street railway franchise provided that on the company's failure to pay the cost of paving between its tracks, the city might forfeit the franchise, a forfeiture would not be enjoined because, from insufficiency of earnings, the company had become insolvent and unable to pay such cost.—UNION ST. RY. CO. V. SNOW, Mich., 71 N. W. Rep. 1073.

87. NEGLIGENCE—Assumption of Risk.—One who, in the daytime, attempts to pass over paving stones which she sees scattered across the sidewalk, assumes the risk of injury.—GRANDORF V. DETROIT CITIZENS' ST. RY. CO., Mich., 71 N. W. Rep. 844.

88. NEGLIGENCE—Pleading.—A complaint for personal injuries arising from negligence must specifically aver plaintiff's freedom from contributory negligence, or state facts showing that his own negligence did not proximately contribute to the injury.—PIERCE V. OLIVER, Ind., 47 N. E. Rep. 485.

89. NEGLIGENCE — Remote and Proximate Cause.—Where A receives a message that his mother is dead, which is delivered a few hours late, and takes a train, and, by reason of a delay in the train, arrives at his destination too late to see his mother or attend her funeral, since A would have reached his destination in time had the trains not been late, the proximate cause of his injury was the delay of the railway company, and not that of the telegraph company; and A cannot recover from the latter for such injury.—WESTERN UNION TEL. CO. V. BRISCOE, Ind., 47 N. E. Rep. 473.

90. NEGLIGENCE — Tort of Child—Liability of Parent.—A father who does not permit his minor son to use a gun is not responsible in damages for the act of his son, who, while out hunting without his father's knowledge, carelessly and purposely shoots a companion, and injures him.—RITTER V. THIBODEAUX, Tex., 41 S. W. Rep. 492.

91. NEGLIGENCE — Unknown Cause.—The rule that where an injury occurs that cannot be accounted for, and the occasion of it rests wholly in conjecture, the case may fail for want of proof, does not apply where there is room for balancing the probabilities, and for drawing reasonable inferences better supported on one side than the other.—SCHOEPPER V. HANCOCK CHEMICAL CO., Mich., 71 N. W. Rep. 1081.

92. PARTNERSHIP—Authority of Partner.—A note, signed by K in his own name, upon which he indorsed the name of a firm of contractors of which he was a member, being executed for lumber furnished under a contract with the firm, is to be regarded as a firm obligation, even without proof of express authority from the other partners for K's indorsement; he being the managing partner and authorized to use the firm's name in the purchase of supplies.—PATTERSON V. SWICKARD, Ky., 41 S. W. Rep. 435.

93. PARTNERSHIP — Decree pro Confesso.—The discretion of the superior court in refusing to set aside a decree taking for confessed a bill for the dissolution of a partnership will not be reviewed where the court permitted defendant to appear and take part in all matters relating to the proof of claims, the disposition of the assets, and to the accounting, as a party interested in the cause, and entitled to be heard.—WHITE V. WHITE, Mass., 47 N. E. Rep. 499.

94. PARTNERSHIP—Dissolution.—A partnership is dissolved when it ceases to do the business for which it was organized.—POTTER V. TOLBERT, Mich., 71 N. W. Rep. 849.

95. PARTNERSHIP — Dissolution—Notice.—Either express or implied notice of the dissolution must be brought home to those who have previously dealt with a copartnership, to relieve the retiring members from liability to such parties upon contracts subsequently made by them with the remaining members.—GILBOUGH V. STAHL BLDG. CO., Tex., 41 S. W. Rep. 535.

96. PARTNERSHIP — Purchase of Land by Partner.—Where one member of a partnership formed for the purpose of conducting a real estate brokerage and ab-

stract business, but not to purchase and sell land on its own account, buys in his own name, and with his own private funds, land that had been listed with the firm for sale on commission, the other member of the firm is not entitled to any share in the land thus bought, in the absence of any previous understanding that it was to be bought for the benefit of the firm.—HENSON v. BYRNE, Tex., 41 S. W. Rep. 494.

97. PLEADING—Action on Note—Amending Answer.—In an action on a note, where the complaint alleged that, at the time it was made, one of defendants joined in the execution by writing her name across the back, and her answer alleged that she signed as indorser, it was error, after plaintiffs had closed their case and a motion for nonsuit had been denied, to permit her to amend her answer by alleging that she signed the note after it was made by her codefendant in pursuance of an agreement between him and plaintiffs to give the note with her as indorser, and that she indorsed it to secure his debt, and that plaintiffs had recognized her as indorser, and that she did not join in the execution.—CUTHBERT v. BROWN, S. Car., 27 S. E. Rep. 485.

98. PLEDGES — Change of Possession.—The intent to pledge does not constitute a pledge, but there must be delivery to the pledgee; and therefore, where bonds held by the president of a railroad company for the company never passed from his control, there was not a pledge of them to a syndicate of which he was a member, though he may have intended to pledge them to secure loans made by the syndicate to the company, there being no actual delivery of them to the trustee of the syndicate who held the notes of the company.—HOOK v. AYERS, U. S. C. C. of App., Seventh Circuit, 80 Fed. Rep. 978.

99. PRINCIPAL AND AGENT — Authority of Agent.—Where an agent is held out to the public as having authority to contract to purchase growing crops for future delivery, the principal is bound by the acts of the agent done within the apparent scope of his authority.—BAKER v. BARNETT PRODUCE CO., Mich., 71 N. W. Rep. 866.

100. PRINCIPAL AND AGENT — Compensation of Agent.—An agency contract for the sale of harvesting machines provided that the agents should obtain orders, house the machines, instruct the purchasers, draw notes, and remit the same; that they should receive a specified selling commission, to be paid only on machines sold and settled for, and not on orders not filled; and that the principal might at any time terminate the contract, and take into its possession all orders, notes, moneys, machines, etc. After the agents took orders for machines, but before they were filled, the principal canceled the contract, and afterwards delivered machines to persons from whom such orders were obtained: Held, that the agents were entitled to reasonable compensation for obtaining such orders, but not to the full commission specified in the agreement.—MERRIMAN v. MCCORMICK HARVESTING MACH. CO., Wis., 71 N. W. Rep. 1050.

101. PRINCIPAL AND AGENT — Liability of Agent.—Where a broker receives money from his principal, to be used for gambling in futures, and actually deals with third parties, from whom he realizes profits in the course of these illegal transactions, he is responsible, as agent, to his principal, as for money had and received for the principal, for the amount of the profits thus realized.—LOVEJOY v. KAUFMAN, Tex., 41 S. W. Rep. 507.

102. PRINCIPAL AND SURETY — Bond of Insurance Agent.—A was employed by plaintiffs as an insurance agent, and gave a bond for the faithful performance of his duties as such agent. The bond provided that A should pay over "all moneys which he now owes or may after owe said general agents, either on account of advances to him or otherwise." Plaintiffs sued on the bond, and, among other sums, sought to recover $300 loaned A prior to his employment: Held, that the clause referred to, when the object and purpose of the bond was considered, had reference only to sums advanced to A, or owed by him, in connection with his agency, for the performance of the duties for which he executed the bond.—BYINGTON v. SHERMAN, Ark., 41 S. W. Rep. 423.

103. QUIETING TITLE—Pleading.—In suits which are purely in the nature of bills to quiet title, the general rule is that plaintiff must aver in his petition that he is in actual possession.—SMITH v. WHITE, Ky., 41 S. W. Rep. 436.

104. QUO WARRANTO — Information.—This court has the right, and under some circumstances, in the exercise of a sound judicial discretion, it may become its duty, to allow an information in the nature of *quo warranto* to be filed by a private person, having no personal interest in the question, distinct from the public, to test the right of an incumbent of a public office to hold the same, notwithstanding the attorney general has refused to give his consent thereto.—STATE v. DAHL, Minn., 71 N. W. Rep. 910.

105. RAILROAD COMPANY—Injury to Stock on Track.—Persons in charge of a locomotive in motion are not bound to keep a lookout for animals trespassing upon the track, nor to presume that they will be there, but having notice of their presence, and that they are liable to injury, are bound to use reasonable care, at least, to avert such injury.—MOORES v. NORTHERN PAC. R. CO., Minn., 71 N. W. Rep. 905.

106. RAILROAD COMPANY—Right of Way.—A railway company which secures a grant of right of way under a contract whereby it agrees to pay without litigation for all stock of the grantor killed by it, does not forfeit the grant by failure to comply with its contract; there being no condition therein that the right of way shall revert to the grantor in case of such non-compliance.—BEAUMONT PASTURE CO. OF 1887 v. SABINE & E. T. RY. CO., Tex., 41 S. W. Rep. 543.

107. REAL ESTATE AGENT — Commission.—Where defendant agreed with a real estate broker to give him a commission for renting certain premises, and the owner, pursuant to said agreement, secured a contract, wherein a third person agreed to take the premises at a price satisfactory to all parties, but, by reason of misrepresentations made by defendant in regard to the duration of certain subleases, he failed to become a lessee, defendant was liable for the commission.—WASHBURN v. BRADLEY, Mass., 47 N. E. Rep. 512.

108. RECEIVER — Appeal.—A receiver has the right of appeal from an order or decree, in the suit in which he is appointed, with respect to any claim asserted by or against the estate which he represents, or respecting his personal rights, but he has not the right of appeal from a decree declaring the respective equities of the parties to the suit. Accordingly, held, that a receiver of a railroad had no right to appeal from a decree awarding a preference to a claim for supplies over the debt secured by the mortgage in course of foreclosure.—BOSWORTH v. TERMINAL R. ASSN., U. S. C. C. of Appeals, Seventh Circuit, 80 Fed. Rep. 969.

109. RECEIVER — Appointment.—Where a bill is brought by the surviving partners against the representative of a deceased partner for an accounting, and to enable the survivors to purchase the business, it is error to appoint a receiver of the business where the surviving partners are abundantly responsible, and can be made to do justice on a final accounting.—COMSTOCK v. MCDONALD, Mich., 71 N. W. Rep. 1087.

110. REMOVAL OF CAUSES—Probate—Community Property. — Proceedings in a probate court to determine whether the property of a deceased person is separate or community property cannot be said to be "a suit of a civil nature at law or in equity," within the meaning of the removal act of 1887-88; and such a proceeding cannot be removed to a federal court, though the opposing parties are citizens of different States. — IN RE FOLEY, U. S. C. C., D. (Nev.), 80 Fed. Rep. 949.

111. REMOVAL OF CAUSES — Time of Application.—The requirement in Judiciary Act 1887-88, that the peti-

tion and bond for removal shall be filed at or before the time the defendant is required by the State law or rules of court to plead, is an imperative limitation, which cannot be extended by stipulation of the parties, or by the discretionary action of the judge in each particular case. — FOX v. SOUTHERN RY. CO., U. S. C. C., W. D. (N. Car.), 80 Fed. Rep. 945.

112. RES JUDICATA.—A judgment for plaintiff against the owner of certain logs, establishing a logging lien thereon, is *res judicata* in replevin of such logs by such owner, though the judgment establishing the lien was erroneous.—CARR v. BRICK, Mich., 71 N. W. Rep. 1103.

113. SCHOOLS — Discharge of Teacher. — A district school board has no power to discharge a teacher for incompetency in the absence of a provision to that effect in the contract; How. Ann. St. § 5065, providing that any contract by the district board with a teacher shall terminate if his certificate of qualification shall expire, and section 5155 authorizing the board of school examiners to revoke a certificate for incompetency. — CARVER v. SCHOOL DIST. NO. 6 OF BATTLE CREEK TP. Mich., 71 N. W. Rep. 859.

114. SLANDER — Damages. — On a trial for slander, an instruction that if defendant spoke the words charged, and has failed to establish his justification, where a general rumor prevailed in the neighborhood of the same tenor as the words spoken, plaintiff would not be entitled to as much damage as if no such rumor prevailed, should have been given. — FOWLER v. FOWLER, Mich., 71 N. W. Rep. 1084.

115. TELEGRAPH COMPANIES — Delay in Delivery. — Plaintiff sent the following telegram to her daughter, announcing the sickness of her stepfather: "L is very sick. Come home at once." On account of the negligent delay of the telegraph company in delivering the message, L was dead and buried before the daughter could reach her mother: Held, that this telegram was not sufficient to put the telegraph company on notice that the message was intended as a summons to the daughter to attend the mother in her distress, and the mother could not recover for mental anguish caused thereby.—WESTERN UNION TEL. CO. v. LUCK, Tex., 41 S. W. Rep. 469.

116. TRESPASS — Money Had and Received.—Plaintiff may recover, on a count for money had and received, the proceeds of the sale of timber cut and taken from his land by a trespasser.—NELSON v. KILBRIDE, Mich. 71 N. W. Rep. 1089.

117. TRIAL—Cross examination.—A memorandum of an account, from which a witness has refreshed his memory, may be introduced in evidence on cross-examination, though it is secondary evidence.—SMITH v. JACKSON, Mich., 71 N. W. Rep. 843.

118. TRIAL — Objectionable Remarks of Counsel. — A judgment will not be reversed because of objectionable remarks of counsel to witness or in argument to the jury, where the court immediately reproved counsel, and stated that such remarks ought not to be made.—FORD v. CHEEVER, Mich., 71 N. W. Rep. 837.

119. VENDOR'S LIEN — Waiver. — A vendor has, independent of contract, an equitable lien for the price, in the absence of waiver thereof. — CURTIS v. CLARK, Mich., 71 N. W. Rep. 845.

120. VENDOR AND PURCHASER—False Representations. —Where a purchaser was induced to buy land owned jointly by the vendor and other heirs by his false representation that the other heirs had allotted the land to him, and by his statement that they would sign a deed of relinquishment, and the vendor delivered a warranty deed and a deed of relinquishment, signed by some of the heirs, and promised to obtain the signatures of the others, but failed to do so, and the vendor was insolvent, the purchaser was entitled to rescind on account of the false representation, without waiting for eviction. — RAMIREZ v. BARTON, Tex., 41 S. W. Rep. 508.

121. VENDOR AND PURCHASER — Rescission. — A purchaser was not entitled to rescind because of false and fraudulent representations, which related merely to future improvements that would be made on the property embracing the lots purchased, such as grading streets, laying water and gas mains, building houses, running a belt line, etc. — SLOTHOWER v. OAK RIDGE LAND CO., Va., 27 S. E. Rep. 466.

122. VENDOR AND PURCHASER — Vendor Retaining Legal Title.—A vendor of real estate who retains the legal title as security for the payment of purchase money may, by subsequent oral contracts with the purchaser, annex further conditions to his obligations to convey; and they will be enforced in equity against a mortgagee of the purchaser who acquires his interest after such further conditions have been annexed, and while the legal title remains in the vendor. — ALLEMANIA LOAN & BUILDING CO. NO. 2 v. FRANTZREB, Ohio, 47 N. E. Rep. 497.

123. WATERS — Surface Waters — Accumulation. — Though a landowner may repel surface water coming from his neighbor's lands to his own, when such water is on his land he may not by artificial means cause it to flow on the land of another, in unaccustomed volume, to his injury. — BORCHSENIUS v. CHICAGO, ST. P., M. & O. RY. CO., Wis., 71 N. W. Rep. 884.

124. WILLS — Construction.—A provision in the will of a decedent that "no deductions shall be made from the share of any of my children by reason of any sums which I have heretofore given or advanced to or for account of either of them," does not operate as a release of liability for a loan made by the testator, after the execution of his will, to a firm of which one of his children is a member, and for which he takes the note of such firm with collateral security. — ROGERS v. MAGUIRE, N. Y., 47 N. E. Rep. 452.

125. WILLS — Conveyance under Power. — A will declared that all of testator's estate should be burdened with the care of his wife, and gave her a life estate therein, and further provided that she might sell the estate, giving thereby an absolute title, but that she should have a life estate only in the proceeds of such sale: Held, that a conveyance by the wife, in consideration of an agreement to support her for life, did not convey the fee, but the grantee might elect to consider it as creating a lien on the land for the value of such support, less the value of the use of the land.—GADD v. STONER, Mich., 71 N. W. Rep. 1111.

126. WILL—Devise — Life Estate.—A will recited that testator devised and bequeathed to his wife, "for her sole benefit, all of my estate, real and personal." After reciting the wife's appointment as the guardian of the testator's son and of the estate, and as executor, the will concluded, "In witness whereof but if one or the other dies, the one that survives the other, take it all:" Held, that the widow took a life estate, with remainder in fee to the son, but, if she survived the son, her life estate would be merged in a fee.—IN RE LITTLEWOOD'S WILL, Wis., 71 N. W. Rep. 1047.

127. WILLS—Distribution of Estate.—A will provided for the sale of real estate, and created a life estate in the wife, with remainder over. It contained a clause providing that, on the death of a legatee before his wife's decease, the heirs of such legatee should take the legacy bequeathed to him: Held that, on the election of the wife to take under the law, the residue of the estate after payment of debts and the widow's portion should be distributed at once to the legatees.—IN RE SCHULTZ'S ESTATE, Mich., 71 N. W. Rep. 1079.

128. WITNESS — Competency—Transactions with Decedent.—One claiming under a deed cannot testify as to facts equally within the knowledge of his deceased grantor as against those claiming under a second deed, and who set up that the first deed had been revoked in view of 3 How. Ann. St. § 7545, which provides that where a suit is defended by the assigns of a deceased person the opposite party shall not be permitted to testify as to matter which must have been equally within the knowledge of the deceased person. —BAILEY v. HOLDEN, Mich., 71 N. W. Rep. 841.